

Pages 1 - 138

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Alsup, Judge

ORACLE AMERICA, INC.,)	
)	
Plaintiff,)	
)	
VS.)	NO. C 10-03561 WHA
)	
GOOGLE, INC.,)	
)	
Defendant.)	
_____)	

San Francisco, California
Thursday, April 14, 2016

TRANSCRIPT OF PROCEEDINGS

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Also Present:

**Matt Sarboraria, Oracle America, Inc.
Andrew Temkin, Oracle America, Inc.
Ruchika Agrawal, Oracle America, Inc.
Renny Hwang, Google, Inc.**

1 Thursday - April 14, 2016

8:00 a.m.

2 P R O C E E D I N G S

3 ---000---

4 **THE COURT:** We'll continue with the Oracle versus
5 Google case.

6 And my law clerk has handed out to you some questions that
7 we'll take up on Tuesday when we do the arguments. We're going
8 to do arguments on Tuesday and Wednesday -- have a seat,
9 please -- for damages on Tuesday and something else will come
10 up on Wednesday, 8:00 a.m. each day.

11 And I need your help on a lot of questions on damages, but
12 I wrote up some of them that are on my mind, and I ask you to
13 please be completely frank with me and not give me smoke and
14 mirrors because when I find out later on that what you told me
15 was only half true and I've wasted ten minutes trying to get to
16 the bottom of something, and then I get confused. I need the
17 help of the lawyers to be completely frank and officers of the
18 court, not advocates, otherwise I'm just going to cancel these
19 hearings and do the best I can on the briefs.

20 All right. Today is -- by the way, I can't find in the
21 history of the universe a single decision that's ever accepted
22 Google's noninfringing alternatives analysis. I know that
23 Dr. Kearl thinks it's right, but he's just an economist. Is
24 there a single decision by a Court of Appeals that says this
25 noninfringing alternatives is a good way to allocate? Maybe.

1 I don't know. I'd like to know if there is or is not. If
2 there's one that says it's no good, let me know that.

3 All right.

4 **THE CLERK:** Calling civil action 10-cv-3561, Oracle
5 America, Inc., versus Google, Inc.

6 Counsel, please approach the podium and state your
7 appearances.

8 **MR. BICKS:** Good morning, Your Honor. Peter Bicks
9 from Orrick for Oracle, and we have our -- you know
10 Ms. Hurst --

11 **THE COURT:** You don't have to introduce everybody.
12 It's the same group; right?

13 **MR. BICKS:** I would just say today that Alyssa Caridis
14 is going to address one of the motions, the JDK motion. I
15 don't think Your Honor has met her.

16 **THE COURT:** No. That's correct. Welcome to the
17 court.

18 **MS. CARIDIS:** Good morning, Your Honor.

19 **THE COURT:** What's your name again?

20 **MS. CARIDIS:** Alyssa Caridis.

21 **THE COURT:** All right. Great. Welcome.

22 **MR. VAN NEST:** Good morning, Your Honor. Bob
23 Van Nest, Keker & Van Nest, for Google. This morning Michael
24 Kwun will address one of the motions -- you know Michael Kwun
25 from our office -- and Gene Paige will address the other.

1 **THE COURT:** All right. Welcome to all of you.

2 **MR. VAN NEST:** Thank you.

3 **THE COURT:** All right. So let's go to OpenJDK, and it
4 comes up in a couple ways. It comes up under factor four. It
5 comes up under possible damages. And I have -- I can't say
6 that it's not going to be allowed so I'm not ruling anything
7 out, but I want you to know it sounds counterfactual to me that
8 if it was so easy to have done it this way, it would have been
9 done this way; but that's just a commonsense reaction and not a
10 judge's reaction. So I need to understand it, and I want you
11 lawyers to please be completely frank with me.

12 All right. Okay. You get to go first. Give me your name
13 again. Alyssa what?

14 **MS. CARIDIS:** Alyssa Caridis.

15 **THE COURT:** A-L-I-S-A?

16 **MS. CARIDIS:** A-L-Y-S-S-A.

17 **THE COURT:** All right. And how do you spell your last
18 name?

19 **MS. CARIDIS:** C-A-R-I-D --

20 **THE COURT:** C-A-R --

21 **MS. CARIDIS:** -- I-D --

22 **THE COURT:** -- I-E --

23 **MS. CARIDIS:** -- I-S.

24 **THE COURT:** Alyssa -- do it again very slowly.

25 **MS. CARIDIS:** Sure. C-A-R --

1 **THE COURT:** C-A-R --

2 **MS. CARIDIS:** -- I-D --

3 **THE COURT:** -- D --

4 **MS. CARIDIS:** -- I-S.

5 **THE COURT:** Thank you. Ms. Caridis, go ahead.

6 **MS. CARIDIS:** Good morning, Your Honor. I am here on
7 behalf of Oracle to talk about Oracle's first *motion in limine*
8 relating to OpenJDK.

9 Oracle seeks to exclude Google from presenting improper
10 evidence and argument relating to OpenJDK for three reasons.
11 First, Oracle seeks to exclude Google from arguing about a
12 speculative hypothetical that it could have used OpenJDK from
13 2007 until the present; second, Oracle seeks to exclude Google
14 from presenting fair use theories that are improper and were
15 not disclosed during fact discovery; and, third, Oracle seeks
16 to strike the expert report of Mr. Andrew Hall.

17 **THE COURT:** All right. Let's do these one at a time
18 and we'll flip back and forth. So let's start with your very
19 first point. We're going to try to cover all three. So repeat
20 that first point.

21 **MS. CARIDIS:** The first point, Your Honor, is that
22 Oracle seeks to exclude Google from arguing the speculative
23 counterfactual that it could have used OpenJDK from 2007 until
24 the present.

25 **THE COURT:** All right. So -- all right. Please go

1 ahead.

2 **MS. CARIDIS:** So, Your Honor, Google intends --

3 **THE COURT:** But isn't -- I mean, lots of times in
4 other cases lawyers are allowed to say, especially plaintiffs,
5 "Here's what we would have done. We would have made billions
6 of dollars if we had only" -- I mean, you do it yourself on
7 your damages. You come up with, "Here's the -- here's how we
8 would have hit a home run if we had not been knocked out of the
9 market."

10 So the fact that it's counterfactual is not the -- only
11 gets to first base; right? So you have to explain why it's so
12 bad and so speculative and just a fraud on the court. Not
13 quite -- I'm overstating it some, but to say that it's
14 counterfactual is not enough. All right?

15 **MS. CARIDIS:** I understand, Your Honor.

16 **THE COURT:** So help me understand why it is so bad a
17 theory that we should not allow the jury to hear this.

18 **MS. CARIDIS:** So, Your Honor, I think the answer to
19 your question is in two parts. The first is that we have
20 documents and testimony showing that Google rejected for a very
21 real reason the exact hypothetical that it is now arguing it
22 could have done in 2007.

23 **THE COURT:** All right. I want you to remember your
24 words. You said "the exact hypothetical."

25 **MS. CARIDIS:** Yes, Your Honor.

1 **THE COURT:** Okay. So they come back and say, "No. We
2 were talking about the virtual machine. We weren't talking
3 about the Classpath and all that." So you still stand by what
4 you just told me?

5 **MS. CARIDIS:** I do, Your Honor.

6 **THE COURT:** The exact hypothetical? Okay. I'm very
7 anxious to hear what you have to say.

8 **MS. CARIDIS:** I look forward to telling you.

9 Your Honor, I was in the courtroom yesterday when you told
10 the parties that you wanted the jury to hear real facts from
11 percipient witnesses, and the second -- my second part to the
12 question that you posed is, in this case we're not hearing
13 about facts and witnesses on Google's side; we're hearing
14 expert witness speculation. So we're not hearing from
15 percipient witnesses. We're not looking at documents. What
16 Google wants to tell the jury is solely driven by expert
17 testimony and ignores the actual facts.

18 So to put us in a little bit of the proper time frame
19 here, Sun announced OpenJDK to the public on November 13th,
20 2006. This announcement included the identification of Sun's
21 chosen open source licenses. So in November of 2006, it was
22 announced that the Java -- that OpenJDK, which includes the 37
23 packages here, was going to be licensed under GPL Version 2
24 with Classpath exception.

25 And, Your Honor, multiple times over the past two months

1 while we've been in court you've asked Google's counsel why
2 didn't they just use OpenJDK back in 2007, and their response
3 consistently has been: It's a timing issue. We just -- you
4 know, Android was about to launch. It had already assembled an
5 Android platform. It was getting ready to launch. Mr. Kamber
6 said that same thing yesterday. But it's just not true,
7 Your Honor.

8 So, Your Honor, what I'm displaying here is a deposition
9 that was marked -- is an exhibit that was marked during the
10 deposition of Dan Bornstein back during the first phase of
11 discovery. I have a copy.

12 **THE COURT:** I can't read it from that distance. If
13 you get it a little bit closer maybe. Just bring the whole --
14 let's see. Sorry. I don't know why I can't read very well.

15 **MS. CARIDIS:** I have a paper copy if you'd like.

16 **THE COURT:** All right.

17 **MR. VAN NEST:** We'd like to be able to see it too,
18 Your Honor.

19 **THE COURT:** All right. Hand the paper copy to both
20 sides. All right.

21 Okay. Well, you did exactly what I wanted. You --

22 **MS. CARIDIS:** I brought you a poster board.

23 **THE COURT:** It's so small I can't read it very well,
24 but okay. "I forgot to ask," it says -- I'm going to read it
25 out loud because I want to -- this is Exhibit 112, Dan

1 Bornstein to Ramy. It says "Java Open Source," date
2 November 28th '06, which you say is a couple weeks after that.
3 All right. Here's what it says. It's short: (reading)

4 "I forgot to ask you the other day. Will Sun's
5 recent announcement about open sourcing Java happen soon
6 enough to benefit Android?"

7 The answer: (reading)

8 "It's not about timing so much as details. The
9 licensing that Sun is using for both SE and ME are
10 incompatible with Android's needs. I'm happy to talk
11 further about it in person. Also, there are some pics
12 from my travels at," something, I can't read it, "if
13 you're interested."

14 All right. Who is Ramy?

15 **MS. CARIDIS:** Ramy Dodin is a software engineer at
16 Android, and he's the one that posed the question to Dan
17 Bornstein, and Mr. Bornstein was the technical lead for the
18 Dalvik virtual machine and core libraries at Android.

19 **THE COURT:** Sorry. Bornstein was?

20 **MS. CARIDIS:** The technical lead.

21 **THE COURT:** Technical --

22 **MS. CARIDIS:** Lead.

23 **THE COURT:** -- lead. All right.

24 Okay. So -- all right. So what -- anticipate what the
25 other side's going to say about this and tell me what your

1 response is.

2 **MS. CARIDIS:** Your Honor, in Google's opposition,
3 Google argued that the documents that we were putting forward
4 were about ME and not SE. This document clearly discusses
5 both. I am, frankly, not sure what their response to this
6 particular document is.

7 **THE COURT:** All right. But your point -- your overall
8 point is that timing was not what was going on, although it
9 says "It's not about timing so much as details." So that's
10 your point.

11 **MS. CARIDIS:** Correct, Your Honor.

12 **THE COURT:** All right. Okay. I understand that
13 point. Why don't we continue on with your next exhibit.

14 You can use the ELMO if you want, but are you going to
15 hand up a copy?

16 **MS. CARIDIS:** I can hand up a copy, Your Honor.

17 **THE COURT:** Please do that. That way I can keep it
18 after the hearing.

19 Okay. So this one is Exhibit Number 156.

20 **MS. CARIDIS:** Correct, Your Honor. It was marked
21 during the first trial -- it was marked during the first trial.

22 **THE COURT:** Oh, a trial exhibit.

23 **MS. CARIDIS:** Yes.

24 **THE COURT:** All right. So it's a pretty long
25 document, so which part is the relevant part?

1 **MS. CARIDIS:** Your Honor, so the very top of the
2 e-mail is the relevant part. It's an e-mail from Cedric Beust
3 to a whole host of people at Android. You'll see that it was
4 sent on November 13th, 2006, which is the day that Sun publicly
5 announced OpenJDK.

6 Sun actually gave Google a heads-up. Google knew about --
7 Google and Android knew about OpenJDK the day earlier, but this
8 particular document is the day of the public announcement. And
9 Cedric Beust in his e-mail acknowledges that the Java SE class
10 libraries, which are what we're talking about here, are
11 released in OpenJDK under the GPL Version 2 with Classpath
12 exception. This is in the first --

13 **THE COURT:** Where does it -- I don't see "JDK"
14 anywhere on here.

15 **MS. CARIDIS:** Your Honor, this entire e-mail chain is
16 talking about Sun's open source announcement, which was the
17 OpenJDK announcement of November 13th, 2006.

18 **THE COURT:** I'll take your word for that, but --

19 **MS. CARIDIS:** I don't think that part is going to be
20 in dispute.

21 **THE COURT:** -- it isn't clear to me, but let's assume
22 that's right. So what is the important part here?

23 **MS. CARIDIS:** So, Your Honor, the first main paragraph
24 after "Here is the current word," Mr. Beust rights: (reading)

25 "Unmodified GPL2 for our SE, ME, and EE code."

1 And then he says: (reading)

2 "GPL2 plus Classpath exception for the SE libraries."

3 Those are the libraries that we are talking about today.

4 **THE COURT:** SE?

5 **MS. CARIDIS:** Yes.

6 **THE COURT:** What does "SE" mean?

7 **MS. CARIDIS:** Standard Edition.

8 **THE COURT:** Okay.

9 **MS. CARIDIS:** Java SE.

10 **THE COURT:** (reading)

11 "GPL2 plus Classpath exception for the SE libraries."

12 All right. I'm going to put a big box around that. But
13 that doesn't say anything. So there must be something better
14 in there than this.

15 **MS. CARIDIS:** Sure. So two paragraphs later in that
16 same top e-mail, Mr. Beust writes: (reading)

17 "I would already be happy if we can just drop in
18 their libraries, but still not sure it's compatible with
19 their licensing choices."

20 **THE COURT:** Okay. So that's the key language.

21 **MS. CARIDIS:** Yes, Your Honor.

22 **THE COURT:** But not being sure is not the same as
23 being sure it can't be done. This is on the day it happened,
24 it was announced.

25 All right. What else you got?

1 **MS. CARIDIS:** Your Honor, you'll also notice that
2 later on in this e-mail chain Brian Swetland, about halfway in
3 the middle of the page, is a participant on this e-mail chain,
4 and Mr. Swetland was a senior staff software engineer, and he
5 was asked during his deposition about this e-mail and
6 specifically about Cedric -- Mr. Beust's e-mail.

7 **THE COURT:** Okay.

8 **MS. CARIDIS:** And in 2000 -- and in his deposition, he
9 was asked whether he, Mr. Swetland, would have been happy to
10 drop in Sun's libraries at that point; and Mr. Swetland's
11 response, and I can hand you up a copy of the transcript if
12 you'd like it but I'm just going to read it verbatim:

13 (reading)

14 "Based on the specifics of their licensing, no,
15 because they would be incompatible with our policy of not
16 using GPL for core libraries."

17 **THE COURT:** Read it one more time, please.

18 **MS. CARIDIS:** In response to the question, "Would you,
19 Mr. Swetland, have been happy to drop in Sun's libraries into
20 Android at that point," Mr. Swetland responded: (reading)

21 "Based on the specifics of their licensing, no,
22 because they would be incompatible with our policy of not
23 using GPL for core libraries."

24 **THE COURT:** Remind me, what -- okay. You don't have
25 to read it again, but remind me what the problem was with the

1 GPL license.

2 **MS. CARIDIS:** So, Your Honor, the GPL license is --
3 it's a very complicated license, let me just start out by
4 saying that. So I apologize. I can explain whatever you'd
5 like me to explain.

6 **THE COURT:** What is it about the GPL that was a
7 problem for the APIs is what I'm trying to get at.

8 **MS. CARIDIS:** Sure. So during the 2006 to 2007 time
9 frame, Google was attempting to convince OEMs to adopt this
10 Android platform; and OEMs, like the Samsungs and HTCs of the
11 world, had a desire to take the Android platform and make
12 modifications to the source code in order to customize Android
13 for their particular phones. So in order to differentiate
14 Samsung Android phones from HTC Android phones, they wanted to
15 make customizations.

16 And the GPL family of licenses -- there are several GPL
17 licenses, but the GPL family in general is known as a copyleft
18 license. And "copyleft" basically means if you make
19 modifications to the source code, you have to make those
20 modifications public. So --

21 **THE COURT:** Public. And so you mean disclose it, or
22 does that mean everyone in the world can use it as well?

23 **MS. CARIDIS:** You have to publish your source code, so
24 it has to be made public. It is still under an open source
25 license, so you publish it under the GPL license, but it is

1 made public for the whole world to see and to use pursuant to
2 the license terms.

3 **THE COURT:** And in the actual event did these
4 companies like Samsung in fact take Android and customize it?

5 **MS. CARIDIS:** Yes, they have, Your Honor.

6 **THE COURT:** HTC as well?

7 **MS. CARIDIS:** Yes, Your Honor. So how -- so these
8 OEMs still keep their source code confidential to this day
9 because, you know -- in part because the Android source code is
10 released under Apache, which does not require you to make your
11 modifications public.

12 One of the things that one of our experts, Dr. Douglas
13 Schmidt, did was reverse engineer one of these phones to see
14 what modifications the OEMs made to the API packages and to
15 other portions of Android in an attempt to differentiate those
16 phones from their competitors.

17 **THE COURT:** I'm just curious. Give me a couple of
18 sentences on what he found.

19 **MS. CARIDIS:** He found that the -- in particular it
20 was an HTC phone -- that HTC made changes to the 37 packages
21 that we're talking about in issue, and he also found that HTC
22 made changes to other portions of the Android source code.

23 And, Your Honor, the reason that other portions of Android
24 source code besides the libraries are relevant here is because,
25 depending on how you distribute source code that is subject to

1 these GPL licenses, you might be infecting other source code.

2 The terms of the license our expert, Ms. Gwyn Murray,
3 proffers requires you to make other parts of the Android source
4 code distributed under GPL with Classpath exception in addition
5 to just the core libraries.

6 **THE COURT:** I'm sorry. You're talking about Android,
7 or are you talking about the original Java GPL?

8 **MS. CARIDIS:** I'm talking about Android. So
9 depending -- so in the open-source world, depending on how you
10 use and distribute source code that is subject to a GPL
11 license, you might not -- based on the terms of the license,
12 you may not only have to distribute the original GPL license
13 code, your modifications to that, you may also be required to
14 distribute other parts of your source code under the GPL
15 license.

16 **THE COURT:** Now you're back to the Java, though.

17 **MS. CARIDIS:** No, Your Honor. I'm still talking about
18 Android.

19 **THE COURT:** You're still talking about Android?

20 **MS. CARIDIS:** Yes.

21 **THE COURT:** "GPL" means what?

22 **MS. CARIDIS:** The GNU general public license.

23 **THE COURT:** General?

24 **MS. CARIDIS:** Public license.

25 **THE COURT:** Let's go back to your e-mails. I

1 understand your point on Number 156, so let's go to the next
2 one, and please hand it up to me if you've got a copy. Thank
3 you.

4 All right. This is one -- sorry. This is Trial
5 Exhibit 415.

6 By the way, just for clarity's sake, are the trial
7 exhibits going to be numbered the same in the upcoming trial?

8 **MS. HURST:** Yes, Your Honor.

9 **THE COURT:** All right. So we at least save ourselves
10 that point of confusion.

11 All right. This is from Dan Bornstein to Ray Chen, copy
12 Steve Horowitz, "Greetings from the Android VM Team," and this
13 is a long one-and-a-half page so you have to help me zero in on
14 what you want me to focus on.

15 **MS. CARIDIS:** Yes, Your Honor. So about three
16 quarters of the way down the page there is a sentence that
17 starts -- a paragraph that starts "We talked about using GNU
18 Classpath."

19 **THE COURT:** "GNU" means what?

20 **MS. CARIDIS:** "GNU" is a name of the organization that
21 is involved in the open source community quite heavily.

22 **THE COURT:** All right. So go ahead.

23 **MS. CARIDIS:** Okay. So to give you a little bit of
24 context, Your Honor, yesterday you'll recall Mr. Kamber listed
25 three options that he said Google had for the 37 Java API

1 packages. The first was Apache Harmony, the second was GNU
2 Classpath, and the third was OpenJDK.

3 Now, so Your Honor -- for Your Honor's information, GNU
4 Classpath and OpenJDK are released under the same license.
5 They're released under the GPL Version 2 with Classpath
6 exception.

7 So what we have here is Dan Bornstein saying that they
8 looked at GNU Classpath, and that the lawyer-advised consensus
9 is that there is a potential for trouble. He continues:

10 (reading)

11 "The same situation holds with Sun's release of their
12 own class libraries under a very similar license."

13 So here we actually have Dan Bornstein, who again is the
14 tech lead for the Dalvik virtual machine and the core
15 libraries, saying, "We looked at GNU Classpath. It doesn't
16 work. There's a potential for trouble, and that the same thing
17 is true for Sun's open source OpenJDK."

18 **THE COURT:** So when it says, "Sun's release of their
19 own class libraries under a very similar license," it doesn't
20 use the words "JDK" there.

21 **MS. CARIDIS:** Correct.

22 **THE COURT:** But you're saying that's what it means?

23 **MS. CARIDIS:** Yes, Your Honor.

24 **THE COURT:** And that a witness can back that up? Is
25 that what Bornstein testified to?

1 **MS. CARIDIS:** Mr. Bornstein I don't believe was asked
2 this point. I would be very surprised if Google disputed that
3 that is referring to OpenJDK.

4 **THE COURT:** All right. So he's saying -- your point
5 is that Bornstein -- what's his position in all this? Is he --

6 **MS. CARIDIS:** Dan Bornstein was the tech lead for the
7 Dalvik virtual machine and core libraries at Android.

8 **THE COURT:** Core libraries?

9 **MS. CARIDIS:** Yes, Your Honor.

10 **THE COURT:** Is that the same thing as APIs?

11 **MS. CARIDIS:** It is the -- it is where the 37 packages
12 in the Android source code live.

13 **THE COURT:** All right. So the guy who was in charge
14 of the 37, Bornstein, says, "The lawyer-advised consensus is
15 that there is potential for trouble"?

16 **MS. CARIDIS:** Yes, Your Honor.

17 **THE COURT:** And he says that's true for both GNU and
18 JDK; right?

19 **MS. CARIDIS:** Yes, Your Honor.

20 **THE COURT:** While we're on this one, what does he say
21 about Apache here?

22 **MS. CARIDIS:** I believe he says that Apache is
23 compatible with their business needs and their business
24 requirements.

25 **THE COURT:** Okay. All right. So that's February 26,

1 '07.

2 All right. What else do we have?

3 **MS. CARIDIS:** The next document was marked as
4 Plaintiff's Deposition Exhibit 215 in July of 2011.

5 **THE COURT:** All right. That is from Joshua Bloch to
6 Jesse Wilson, "Re Open JDK on Android." That's December 7th,
7 2009.

8 Okay. What's the part there that is important?

9 **MS. CARIDIS:** So there are two parts here that are
10 important. The first is Mr. Wilson's original e-mail to
11 Mr. Bornstein, and at the very last sentence of the first full
12 paragraph from Mr. Wilson's e-mail, he says: (reading)

13 "I'd like to be certain that OpenJDK's class library
14 is not an option for Android."

15 He says --

16 **THE COURT:** Wait. Wait. I don't -- I'm just sorry I
17 don't see that paragraph. I know you're reading it right, but
18 show it to me. What paragraph is it?

19 **MS. CARIDIS:** Sure. So the first paragraph that
20 starts "I work on core libraries."

21 **THE COURT:** Right.

22 **MS. CARIDIS:** It's the last sentence of that
23 paragraph.

24 **THE COURT:** I see. Let me read the sentence before
25 that. I'll read it out loud: (reading)

1 "It's also a waste of Google's engineering talent to
2 be maintaining two independent copies of the Java class
3 libraries: Google 3 and App Engine both use OpenJDK,
4 but" -- something -- Crore?

5 **MS. CARIDIS:** Crore.

6 **THE COURT:** (reading)

7 -- "Crore both use Harmony. I'd like to be certain
8 that OpenJDK's class library is not an option for
9 Android."

10 Let me just read the next. He continues on to say:

11 (reading)

12 "As I see it, the primary hurdle is OpenJDK's
13 licensing. It's licensed under GPL plus Classpath
14 exception; whereas, Android is Apache licensed, but our
15 Linux kernel is GPL. So there's a small precedent of
16 mixed licensing in Android. As I understand it, OpenJDK's
17 Classpath exception gives us additional flexibility."
18 All right. So what's your point to be made on this?

19 **MS. CARIDIS:** Sure. So Mr. Wilson is asking
20 Mr. Bornstein, "I want to be sure we can't do OpenJDK in
21 Android." And at the top of the document that I handed --

22 **THE COURT:** Well, I thought it was from -- the other
23 way around. I thought it was from Bloch to Wilson.

24 **MS. CARIDIS:** No, Your Honor. If you look at the
25 fourth line of the e-mail, you see that it's a -- that the

1 e-mail that we were just looking at was from Jesse Wilson, and
2 then the top three lines of the document are Mr. -- sorry --
3 Mr. Bloch's response. You're right, Your Honor. I think I
4 said Mr. Bornstein.

5 **THE COURT:** I'm confused. The part that I read out
6 loud, who wrote that?

7 **MS. CARIDIS:** Mr. Wilson.

8 **THE COURT:** So -- I see. You're right. It does say
9 "Wilson wrote." And then the part that is the response is
10 where the bullet points start?

11 **MS. CARIDIS:** No. The part that is the response are
12 the top three lines of the document where he says: (reading)

13 "Jesse, ooh, you put your hand into the buzz saw."

14 **THE COURT:** I see. So the vast majority of this page
15 is all from Jesse all the way from on Monday, December 7th, all
16 the way down to "Thanks, Jesse." That's all Jesse?

17 **MS. CARIDIS:** Yes, Your Honor.

18 **THE COURT:** And then Josh only has one short sentence
19 saying "a buzz saw"?

20 **MS. CARIDIS:** Yes.

21 **THE COURT:** All right. So what is your point about
22 this document?

23 **MS. CARIDIS:** So Mr. Bloch was asked during his
24 deposition in 2011 what he meant by his buzz saw comments.

25 **THE COURT:** Okay. What did he say?

1 **MS. CARIDIS:** Mr. Bloch was asked: (reading)

2 "Why did you write that?"

3 Speaking about the buzz saw comment.

4 **THE COURT:** Yeah.

5 **MS. CARIDIS:** And Mr. Bloch responded: (reading)

6 "Because he" --

7 **THE COURT:** Show me on there where that is. Sorry to
8 be so... Oh, I see it. All right. "Because he mentioned sort
9 of a verboten topic"; right?

10 **MS. CARIDIS:** Right. (reading)

11 "And what was the verboten topic?

12 "Using OpenJDK instead of Harmony in Android."

13 **THE COURT:** Keep going. Read the rest for me.

14 **MS. CARIDIS:** (reading)

15 "And why was -- why did you regard that as a verboten
16 topic?

17 "ANSWER: Because I'd heard it discussed before and
18 quickly the discussions would always end with, 'You know,
19 we can't do that. Our partners can't use GPL code other
20 than the Linux kernel itself.'"

21 **THE COURT:** Okay. Educate me on that part. Why
22 was -- why could you use GPL on Linux? Why would the partners
23 go with Linux GPL?

24 **MS. CARIDIS:** So, Your Honor, Google used the Linux
25 kernel at the bottom of the Android source code stack. So

1 Linux is part of the Android stack, and Linux is subject to the
2 GPL license.

3 But in order to protect the OEMs from the effects of the
4 GPL license in the Linux kernel, Google designed what is called
5 a hardware abstraction layer. It's a separate piece of source
6 code that was designed in order to insulate the GPL of the
7 Linux kernel from the rest of the Android source code stack.
8 So Google basically designed an insulation layer to insulate
9 the effects of having the GPL Linux kernel in Android.

10 **THE COURT:** All right. I don't under -- just to be --
11 you did a good job explaining it, but I don't understand what
12 you just said, and maybe I don't need to.

13 So let's stick -- for our present purposes I don't need
14 to. Let's stick with what you've got for your next exhibit.
15 How many more exhibits do you have?

16 **MS. CARIDIS:** Your Honor, actually I think that that's
17 all to discuss for this particular point.

18 **THE COURT:** All right. So what I want to do is, we're
19 going to come to your other points in a minute unless you have
20 depo testimony you want to read to me or trial testimony that
21 bears on the same point.

22 **MS. CARIDIS:** No, Your Honor.

23 **THE COURT:** All right. So why don't you have a seat,
24 or you can stand there if you wish.

25 Who's going to argue this for the other side? Remind me

1 your name again.

2 **MR. KWUN:** Michael Kwun, Your Honor.

3 **THE COURT:** K-W-A-N?

4 **MR. KWUN:** K-W-U-N.

5 **THE COURT:** U-N. All right. So what do you say to
6 these exhibits?

7 **MR. KWUN:** Okay. So I --

8 **THE COURT:** Take them one at a time now.

9 **MR. KWUN:** Sure.

10 So before we go into the exhibits, I just want to remind
11 the Court what the legal standard is that we're confronting
12 here. The basic argument is that we should not be allowed to
13 present evidence about what we could have done with OpenJDK
14 because it is supposedly contradicted by the evidence.

15 And the case they cite on this, one of the cases they
16 cite, is *Concord Boat v. Brunswick*, which is 207 F.3d 1039, and
17 it's a -- let me make sure -- it's -- actually it's an
18 Eighth Circuit case.

19 But what the Eighth Circuit case says is that an expert
20 opinion cannot sustain a jury's verdict when it is not
21 supported by sufficient facts to validate it. That's nothing
22 surprising. And then it also says, "or when indisputable
23 record facts contradict or otherwise render the opinion
24 unreasonable."

25 So for them to prevail on this motion based on the notion

1 that the evidence shows that this never would have happened,
2 that evidence has to create an indisputable record that
3 contradicts the factual premise that we're trying to present.

4 So to the extent that it's not indisputable, what they
5 should be doing is they should be presenting this evidence, if
6 they like, on cross-examination or otherwise trying to rebut
7 the case. But if they want to exclude it -- if they want you
8 to exclude it, rather, they have to establish that it's
9 indisputable that we never would have used the OpenJDK class
10 libraries. So that's the first point.

11 The second --

12 **THE COURT:** Are you ever going to get around to these
13 e-mails?

14 **MR. KWUN:** Yes. Yes, Your Honor.

15 The second point I want make, and then I will get into the
16 e-mails, but this is just going to be just two pages from an
17 admitted trial exhibit from the first trial. This is Trial
18 Exhibit 387, and it's a long document, but I just want to point
19 the Court to a couple pages of it.

20 It's -- well, it's an e-mail on the front cover and it's
21 an e-mail from Rich Miner. It's dated November 9th, 2006, and
22 it says --

23 **THE COURT:** I need some of those little stick-on
24 things.

25 **MR. BICKS:** Here, Judge.

1 **THE COURT:** No, no. My clerk will give me some.

2 Thank you. Do you have the small little color-coded ones?

3 All right. What page do you want me to look at?

4 **MR. KWUN:** Well, first of all, just on the front page
5 we can see that this is from November 9th, 2006. The subject
6 line is "Pres," and then it attaches a long PowerPoint
7 presentation. And you can see from the next page, the first
8 page of the presentation, that this is a November 2006
9 presentation seemingly for T-Mobile.

10 **THE COURT:** November 9. Okay.

11 **MR. KWUN:** And on the next page you can see that the
12 presentation itself, which is the attachment, is also
13 November 2006.

14 **THE COURT:** Yeah.

15 **MR. KWUN:** And if you turn to page 7 of the trial
16 exhibit, which is page 6 of the presentation, you can see in
17 the upper left that Google is trying to convince T-Mobile to
18 adopt Android.

19 And we have to keep in mind what Android was at the time.
20 So this is November 2006, which also is when OpenJDK -- well,
21 rather, the open sourcing of Java, which included OpenJDK; but
22 in November of 2006, we have to keep in mind what Android was
23 supposed to be at that point.

24 And what Android was supposed to be at that point, if you
25 look at this triple circle on this diagram, at the top you see

1 "J2ME." That's Java 2 Micro Edition. So in November of 2006,
2 the plan of record that we were telling partners about is that
3 we were going to use Java ME, not Java SE, Java ME in Android.

4 So you have to keep -- bear that in mind when you're
5 looking at some of these -- the evidence that you're seeing
6 that is from November of 2006 when this announcement was made.

7 So with that, why don't we go through some of these
8 exhibits that get cited.

9 So, first of all, we were going through Trial Exhibit 156.
10 Trial Exhibit 156 was marked in the *motion in limine* as
11 Silverman Declaration Exhibit 13. And since that's the one
12 that was marked in the papers, that's the copy I have with me.
13 I believe the only difference is that it doesn't have the trial
14 exhibit label on it, but otherwise it should be the same
15 e-mail. So this is one -- I think this is one of the ones that
16 was being discussed earlier in the argument today.

17 And because of the nature of how these e-mail threads
18 work, if you want to get the story in order, you have to kind
19 of read it from the bottom because you get the first e-mail;
20 and then when the next person responds, they respond above it
21 typically; and then the next person responds above it. So the
22 chronological order here requires looking at the bottom here;
23 and, frankly, even there it's a little tricky because sometimes
24 when people respond, instead of just putting their response
25 above, they take the previous e-mail and intersperse their own

1 comments in it.

2 And that's what -- if you look here in the e-mail, about
3 halfway down the page you see November 13th, 2006. So these
4 are all happening on the same day, and seemingly they're all
5 happening early in the morning since Cedric's e-mail at the
6 very top, the latest in chronological order, is at 7:12 a.m.

7 But you see this e-mail that came from Brian Swetland, and
8 in it he quotes some text from a prior e-mail, that we
9 seemingly don't have the entirety of, from Andy Rubin. And
10 Andy Rubin is talking about the Classpath exception that has
11 been announced in this, and there's a CNET article that he's
12 talking about, a news dot-com article that he's talking about,
13 and that itself is talking about the open source announcement.

14 So Mr. Rubin talks about the Classpath exception; and then
15 Brian Swetland responds to Mr. Rubin's e-mail, and he quotes
16 that part that Mr. Rubin talked about the Classpath exception,
17 and then he says: (reading)

18 "Ah ha. Here's the trick. Same article."

19 And he says: (reading)

20 "In the case of Java SE," Java Standard Edition,

21 "we're enhancing the GPL with the Classpath exception."

22 And then in the next paragraph Mr. Swetland says:

23 (reading)

24 "If that really means only SE," which seems likely

25 based on his phrasing, "and ME," Java Micro Edition, "is

1 GPL only, it effectively prevents you from using it,"
2 meaning Java ME, "in most any embedded product unless the
3 entire thing," meaning your entire product, "is GPL."

4 So what Mr. Swetland is saying is, "Oh, they may have a
5 Classpath exception for Java SE, but it sounds like Java ME is
6 not going to have a Classpath exception. And if Java ME
7 doesn't have a Classpath exception, then if we were to use
8 that, we would have a problem because of this GPL license that
9 does not have the Classpath exception."

10 Now, then, if you -- there is a following e-mail -- you
11 have to go further up the page now -- from David Turner, and he
12 says: (reading)

13 "Very frankly, I wouldn't be surprised if the
14 Classpath exception did not cover ME."

15 So that's consistent with what Mr. Swetland said, and he
16 has some explanation for why he thinks that that would be the
17 case.

18 And then, finally, we have the e-mail from Mr. Beust, and
19 he says, "Here is the current word." And we already heard
20 about this part. And if you read the way that the current word
21 is written, it sounds a lot like he has cut and pasted it from
22 something Sun says because it refers to "unmodified GPL for our
23 SE, ME, and EE code," which would be, of course, something that
24 Sun says because it's their code, "GPL2 plus Classpath
25 exception for the SE libraries."

1 So, again, keeping in mind that at the time that this
2 e-mail thread is going on, the plan of record for Android was
3 to do something that was analogous to J2ME, Java 2
4 Micro Edition. When Mr. Beust says "unmodified GPL2 for SE,
5 ME, and EE, GPL2 plus Classpath exception for the SE
6 libraries," what he is doing is he is confirming everything
7 that we have seen in the prior e-mail thread, which is that
8 Java ME will not have the Classpath exception.

9 And he said: (reading)

10 "I would already be happy if we can just drop in
11 their libraries, but still not sure it's compatible with
12 their licensing choices."

13 So, again, as you noted, Your Honor, this is all happening
14 pretty much when this news is coming out. So this is all very
15 preliminary. But what he is saying is their libraries --
16 dropping in their libraries, would not be -- might not be
17 compatible with Sun's licensing choices.

18 And since what they were talking about at the time was
19 creating an operating system that used something like Java 2
20 ME, what -- I don't have -- the words are not here, but I think
21 that the logical conclusion is that what he is saying is that
22 if we were to drop in the open source Java ME libraries, that
23 would not be compatible with Sun's licensing choices, or might
24 not be compatible with Sun's licensing choices.

25 So, in other words, if we dropped in libraries that were

1 subject to GPL without the Classpath exception, we would have a
2 problem or potentially have a problem. And why is that? Well,
3 let's go back to the beginning of the thread, which is at the
4 bottom of the page, where Mr. Swetland says, and this is the
5 three-line paragraph towards -- near the bottom of the page:
6 (reading)

7 "If that really means only SE and ME is GPL only, it
8 effectively prevents you from using it in most any
9 embedded product unless the entire thing is GPL."

10 So they're not talking about problems with the Classpath
11 exception. So that's the first e-mail that we saw.

12 **THE COURT:** But -- all right. Let's stick with this
13 for a second.

14 **MR. KWUN:** Okay.

15 **THE COURT:** This was the day that the announcement
16 came out about JDK; right?

17 **MR. KWUN:** Yes.

18 **THE COURT:** But what I don't get, help me understand,
19 no one uses that phrase "JDK" in this document.

20 **MR. KWUN:** Yeah. So I agree. And what happened was
21 when the announcement was made, I don't think that they were
22 consistently using the term "JDK" yet. So what they said, and
23 I don't have the CNET article that is being mentioned here, but
24 I believe what they said is that they were open sourcing
25 OpenJDK -- or excuse me -- they were open sourcing Java SE,

1 Java EE, and Java ME. They didn't have brand names being
2 discussed in the article, or at least in many places they
3 weren't using brand names yet.

4 So -- but we do agree that when they talk about JDK, that
5 generally refers to OpenJDK. That is a shorthand that Sun
6 typically uses to refer to OpenJDK.

7 And the announcement that they're talking about here is an
8 announcement of open sourcing SE, ME, and EE code, and when
9 they talk about open sourcing SE code, that is what ultimately
10 was called OpenJDK, whether or not it was consistently in
11 November 2006.

12 **THE COURT:** Okay. Let's go to the next one.

13 **MR. KWUN:** Okay. So I'm just trying to make sure I go
14 through the same exhibits.

15 We also saw Trial Exhibit 415. This was not actually --
16 this is one of the ones that was handed up to you. This, by
17 the way, was not an admitted trial exhibit in the first trial.
18 It was marked but it wasn't ever offered into evidence, and it
19 wasn't ever accepted into evidence; but --

20 **THE COURT:** But maybe it will be this time. I mean --

21 **MR. KWUN:** No, I agree. I just wanted --

22 **THE COURT:** -- that doesn't get very far, but --

23 **MR. KWUN:** No.

24 **THE COURT:** -- tell me what your point is on this one.

25 **MR. KWUN:** Yeah. So this is in February of 2007. So

1 this is a little later. It's still before the formal actual
2 release of OpenJDK.

3 OpenJDK, the virtual machine source code was released in
4 November of 2006. The class libraries weren't actually -- the
5 source code for the class libraries wasn't released as open
6 source until May of 2007. And, of course, it's the class
7 libraries that are the ones we're most interested here. So the
8 class library source code has not yet been formally released
9 yet. So there is --

10 **THE COURT:** What was it that was released in November?

11 **MR. KWUN:** Two things happened in November of 2006.
12 One is Sun had from long before November 2006 hinted that they
13 would be open sourcing something for Java, and exactly when was
14 unclear. In November of 2006, they made a clear commitment to
15 open source Java ME, SE, and EE; and at the same time they
16 released the source code under a pure GPL2 license, no
17 Classpath exception, for Hotspot, which is the virtual machine
18 that is inside OpenJDK, and for Java C, which is the compiler
19 that developers can use to compile their source code into byte
20 code.

21 And they said that they would be working to release the
22 class libraries and the rest of the material over -- I believe
23 at the time of the announcement they said they were planning to
24 do that in the first half of 2007, and they ultimately did that
25 in early May 2007.

1 **THE COURT:** What was -- this is -- all right. Maybe
2 you can explain it. Prior to this announcement in November,
3 what was the licensing term, and how did it then get different
4 for, lets say, SE or ME, whichever one is easy to explain?
5 What changed about it in November?

6 **MR. KWUN:** So prior to November 2006, Java ME and
7 Java SE were available if you wanted implementing code. If you
8 wanted the whole thing, they were available under a
9 commercially negotiated license. So they were closed source.
10 If you wanted to have access to it, you had to go to Sun. You
11 had to negotiate a license, a very traditional source code
12 license, you know, that was far more common in a prior era
13 before open source became more popular.

14 **THE COURT:** So even if you wanted to just write
15 something in Java, you had to have a license from Sun?

16 **MR. KWUN:** If you wanted -- that's a good point. You
17 could also download compiled object code. So you could
18 download -- if you were a developer who wanted to write
19 programs that ran with Java ME or Java SE, you could download a
20 virtual machine, not the source code for the virtual machine,
21 but you could download a virtual machine, or you could
22 download -- you must have been able to download some sort of a
23 SDK that would not have the implementing code for the class
24 libraries but would have enough so that you could code to the
25 specification so that you could link with these binaries that

1 were provided by Sun.

2 So the thing that changed was -- really the big thing that
3 changed was that they were open sourcing the source code.

4 **THE COURT:** What does that mean, "open sourcing"?

5 **MR. KWUN:** So the -- "open sourcing" means that they
6 were providing it under the terms of a license that provided
7 for certain freedoms. And so open sourcing is a legal umbrella
8 term for a variety of licenses. It's also a bit of a
9 philosophy.

10 And the general notion of the open-source movement is that
11 you should be able to have access to the code so that if you
12 want to change it and you want to modify it, you can make
13 changes to make it work better for your system or whatever.

14 And there's also a general belief that if you open source
15 source code, that will allow bugs to be fixed more quickly and
16 generally allow improvements to the system. So that if you
17 have -- to take a comparison, if you compare Linux, which is
18 open source, as an operating system to Windows, Windows has to
19 rely on its own internal developers to improve the system;
20 whereas, Linux because the source code is published and freely
21 available to anyone who wants to look at it, they can rely on
22 the efforts of a larger community to improve the product.

23 **THE COURT:** But after this announcement in November
24 '06, there still was a problem with the GPL; right? In other
25 words, the OEMs would not be able to keep secret their

1 modifications to Java programs; right?

2 **MR. KWUN:** Under a pure GPL license, there were some
3 issues, definitely. Under a -- under the Classpath exception,
4 you didn't necessarily have that problem. And if you'd like, I
5 can walk through the license and explain what that means.

6 **THE COURT:** No, not -- no, not yet.

7 **MR. KWUN:** Okay.

8 **THE COURT:** I want to stick with this document for a
9 moment.

10 All right. So tell me again what you think -- I don't see
11 the part here that helps you on what happened in November '06.

12 **MR. KWUN:** Yeah. This is not -- this is not a
13 November '06 document. This one is a February 2007 document.
14 I was just trying to go through all the documents that we had
15 seen.

16 **THE COURT:** All right. But let me zero in on it. The
17 counsel told me a minute ago -- Ms. Caridis told me a moment
18 ago this paragraph says, the lawyer on the licensing front:
19 (reading)

20 "Although Classpath would 'probably' be okay in my
21 opinion, the lawyer-advised consensus is that there is
22 potential for trouble."

23 And she said that was talking about what we have been
24 referring to as JDK.

25 **MR. KWUN:** So, yeah. So there are a variety of

1 different licensing choices that Google could have made for the
2 Android project, and Android ultimately settled on a preferred
3 license for the Android project of using the Apache 2.0
4 license.

5 The Apache 2.0 license is another open source license.
6 It's what's known as a permissive open source license. And
7 what that term generally means is that permissive open source
8 license gives you, the licensee, access to the source code,
9 allows you to modify it, and does not require that you publish
10 your modifications. So that's a permissive open source
11 license.

12 There are also what are sometimes referred to as copyleft
13 open source licenses. Copyleft open source licenses,
14 obviously, it's a play on copyright. It's a term that was
15 created by the GNU Foundation, the free software foundation who
16 wrote the GNU license. A copyleft license is sometimes by
17 others referred to as having a viral infect because it, you
18 know, infects, is the term that is used, code that is beyond
19 the open source code.

20 And so a copyleft license says that -- has two key
21 components. One is it says that, "If you modify the code that
22 we give you, you need to publish your modifications." That's
23 sometimes referred to as -- you may have heard witnesses in the
24 first trial refer to that as a give-back provision, you're
25 required to give it back to the licensor. It's actually

1 technically not a give-back provision. You have to publish it
2 to the world. If the licensor then wants to take it, they
3 certainly can; but you don't have to literally give it back to
4 Sun, for example, but you have to make it freely available to
5 Sun in this instance. So that's one aspect of the copyleft
6 license.

7 **THE COURT:** What is -- I don't -- copyleft, how did
8 that term come -- copyleft, what does it mean?

9 **MR. KWUN:** So the Free Software Foundation has a
10 general philosophical belief that copyright -- that the regime
11 of copyright can sometimes have the effect of clamping down
12 innovation; and that when people use copyright to keep their
13 code private, it means that other people can't improve that
14 code.

15 And whether they have that right or not, they think that
16 that is not the highest-and-best use of computer code. So they
17 came up with a regime which uses the rights that you are given
18 under copyright but creates what the Free Software Foundation
19 views as a better world, and they called this new world --

20 **THE COURT:** And the left is just --

21 **MR. KWUN:** It's just a pun.

22 **THE COURT:** -- a bookend, it's a pun on copyright?

23 **MR. KWUN:** Yeah.

24 **THE COURT:** Oh, okay.

25 **MR. KWUN:** It's a play on copyright. They're, like,

1 "Well, we don't think that the traditional copyright way of
2 doing things is our favorite. We're going to come up with a
3 variation on it," and they called it copyleft.

4 But it has two key components. One is that if you modify
5 your code with a copyleft license, you have to publish your
6 modifications and freely license them to others.

7 The other thing that can happen in a copyleft license is
8 they can sometimes say, "And, as a matter of fact, if you
9 combine the copy -- the GPL code, for example, with some other
10 code, not only do you need to publish your modifications to my
11 code," the licensor's code, "you need to publish the stuff that
12 you combined with my code."

13 So if you take source code file A, which is under a GNU
14 license, and you combine it with source code B, which you wrote
15 yourself, and you compile that and ship a product that is now
16 A plus B, which we can call C, when you do that, you need to
17 publish the source code not just for your modifications to A,
18 my code, but you also need to publish your code for B. So that
19 second part is what is commonly referred to as the viral
20 effect.

21 **THE COURT:** All right. But you're -- okay. You
22 probably explained this, but I am still not getting it. What
23 do you say to the -- it says "the lawyer-advised consensus is
24 that there's potential for trouble," and she says that talks
25 about JDK.

1 **MR. KWUN:** Yeah. So --

2 **THE COURT:** All right. So that is a bad document for
3 you, and I don't see what you're -- I don't understand your
4 explanation for it.

5 **MR. KWUN:** So the question for the *motion in limine* is
6 whether Mr. Bornstein suggesting that the Classpath license
7 would create a potential for trouble, whether that means that
8 it is indisputable that Google would not have adopted that,
9 and --

10 **THE COURT:** Well, maybe this one document doesn't; but
11 if you put them all together, maybe it does. I don't know.

12 **MR. KWUN:** Well --

13 **THE COURT:** All right. So you don't have an
14 explanation for this. You just say that potential for trouble
15 is not the same thing as an absolute dead-end.

16 **MR. KWUN:** That's true. And, yeah, I'm not saying
17 there is anything here that says absolutely, "Oh, let's use
18 OpenJDK." That's definitely not the case.

19 What I think Mr. Bornstein is referring to here is a
20 general preference that Google had for a more permissive
21 license, such as Apache, the Apache 2.0 license.

22 That said, when Google launched Android, it included --
23 one of the key components in Android is something called
24 WebKit. WebKit is a third-party open source product module
25 that allows -- that provides the functionality of Web page

1 rendering. So that's pretty important for a smartphone. It's
2 how you actually show things that you see on the Internet.

3 And WebKit is licensed under something called the Lesser
4 GNU Public License, the LGPL, and the LGPL is in many ways
5 similar to the GNU Classpath license and it also has copyleft
6 effects.

7 So I only bring that up to note that even if a license
8 like that causes a potential for trouble, that did not keep
9 Google from ultimately adopting WebKit, which is LGPL, and it
10 did not keep its partners from selling Android phones and using
11 the Android platform.

12 **THE COURT:** All right. What's your -- you've now done
13 415 and 156. What do you say to the other two?

14 **MR. KWUN:** So I don't have 112 because it wasn't cited
15 in the papers, but if you have -- if you can hand me your copy.

16 **THE COURT:** I'll read it to you. It's Dan Bornstein
17 on November 28th, "It's not about timing so much as details."
18 So you've been telling me it was a timing problem. Here he
19 says, "It's not about timing so much as details." So what do
20 you say to that one?

21 **MR. KWUN:** So in November 2006, it was absolutely
22 about details, and the details were that the product that they
23 were talking about shipping -- or creating, I should say, in
24 November 2006 was a product that would use J2ME. And so that
25 is the key detail, and the key detail is that in November 2006,

1 Sun said that they would be open sourcing Java ME under a pure
2 GPL2 license.

3 **THE COURT:** But how could -- to me that doesn't make
4 sense. How did Google plan to use J2ME and get around these
5 licensing restrictions?

6 **MR. KWUN:** Well, at the time they were still exploring
7 a variety of options. So one option would have been to get a
8 license from Sun. Another option would have been to get a
9 virtual machine and libraries from another provider that for
10 whatever reason could provide that to them. Another option,
11 which is the one that they ultimately went with with SE, was to
12 write their own libraries or use third-party libraries that
13 were available as open source because at the time nobody
14 thought that that was going to be a legal problem.

15 And that actually -- yesterday Mr. Kamber referred to some
16 options that we had and that we considered, and he mentioned --

17 **THE COURT:** Remind me. Just help me on the timeline.
18 Something you just said reminded me. There was a memo I
19 remember, or e-mail, where there were negotiations with Sun,
20 and they finally collapsed and cratered. When did that crater?

21 **MR. KWUN:** I don't know the exact date on which they
22 stopped discussions, but I believe that their discussions were
23 still going on in 2007.

24 **THE COURT:** If you just believe it, that's not good
25 enough. Does somebody actually know the answer? There's an

1 e-mail somewhere that's very clear-cut on it. I remember it
2 from the first trial.

3 **MR. BICKS:** Your Honor, you may be thinking of the --
4 because there were several rounds of negotiations, and you may
5 be thinking about the e-mail right prior to the filing of a
6 lawsuit.

7 **THE COURT:** No. This was a couple of years before the
8 lawsuit.

9 Okay. Nobody knows. All right.

10 **MS. HURST:** Your Honor, it's May 2006.

11 **THE COURT:** May 2006?

12 **MS. HURST:** That's when the discussions of a Project
13 Armstrong ceased.

14 **MR. VAN NEST:** I don't think that's right, Your Honor,
15 but we'll check. I believe that there were negotiations much
16 later than that as well, but we'll check the record and try to
17 answer your question.

18 **THE COURT:** All right. Thank you.

19 **MR. KWUN:** But yesterday Mr. Kamber discussed the fact
20 that there were several options that we could have used rather
21 than OpenJDK; that we could have used Apache Harmony, we could
22 have used GNU Classpath.

23 This is just a demonstrative. You had asked for a chart.
24 We didn't make a blowup. I apologize for that. We thought it
25 might be easier to read, actually, if you have it in front of

1 you. So I have it up on the ELMO, and this is just -- there
2 was actually many more options, and at some point it becomes
3 too complicated to present on a chart.

4 But our options included talking to Sun and doing a deal
5 with Sun. That's the one in the far left column. If we had
6 done that, we would have had to negotiate a license with some
7 sort of commercial terms; and what we would have gotten from
8 them was a full virtual machine and full set of class
9 libraries, including all the implementing code.

10 We could have done the open source route, such as
11 Classpath or Harmony; or once it was released, we could have
12 considered OpenJDK.

13 We also had some discussions with other companies, and as
14 one example, we had discussions with a company called Skelmir.
15 And as you can see from their logo, Skelmir is a virtual
16 machine technology company. But we had discussions with
17 Skelmir. Skelmir was at the time known for having created
18 implementations of Java that ran on set-top boxes. So for, you
19 know, the television realm. And we were -- we had some
20 discussions with them about potentially acquiring or licensing
21 from them a virtual machine which would have come with a set of
22 class libraries.

23 So --

24 **THE COURT:** But how -- if you were going to use the
25 same 37 APIs, I don't see how Skelmir could have rewritten that

1 and avoided the licensing problem.

2 **MR. KWUN:** Skelmir could not have avoided the
3 licensing problem. They were a clean-room implementation.
4 Skelmir operated under the same theory that we operated under,
5 which was that this wasn't a legal problem.

6 As we now know from the Federal Circuit, absent a defense
7 of fair use, there is an issue; but at the time, you know, the
8 fact that Skelmir was out there actually commercializing this
9 in set-top boxes well illustrates that the industry didn't
10 believe this was a problem.

11 **THE COURT:** I don't know if that's true or not. Is
12 there some memo within Google anywhere that happens to say what
13 you just told me?

14 **MR. KWUN:** Some memo discussing these five options?

15 **THE COURT:** No.

16 **MR. KWUN:** Or this --

17 **THE COURT:** That says -- here's the way I -- look,
18 this is a simplistic way, but I think what I'm about to say is
19 true. Initially Google went to Sun and tried to get a license,
20 and then they couldn't agree on the dollar amount so Google
21 backed up and decided to use those 37 APIs; but to avoid
22 copyright infringement, rewrote the implementing code.

23 Now, is there a memo somewhere in Google that says, "This
24 will solve the problem. We are perfectly free to use the
25 declaring code in the SSO but as long as we rewrite the

1 implementing code"?

2 **MR. KWUN:** We don't have a memo that directly says
3 that. We do have witnesses who testified that at the last
4 trial.

5 **THE COURT:** Is there a memo from one of these other
6 companies that says that that was contemporaneous at the time?

7 **MR. KWUN:** I am not aware of such a memo.

8 **THE COURT:** All right. I want to go back to these
9 four documents that -- I think you've done three so far. So
10 the last one is Number 215 about the "buzz saw," December 7th,
11 Pearl Harbor Day, 2009.

12 **MR. KWUN:** Okay. So this is December 7th, 2009. By
13 December 7th, 2009, Google had launched Android. It had a
14 product in the marketplace.

15 By December 2009, there were phones shipping that had
16 Android on them. So the question in December 2009 was not,
17 "Hey, we're developing this product. We have to write some
18 class libraries. How should we do that?" We had class
19 libraries. We had complete implementations of the class
20 libraries based on Apache Harmony code.

21 So if in December 2009 we were going to switch to OpenJDK,
22 the question wasn't why not use OpenJDK, the question was why
23 should we use OpenJDK.

24 In December of 2009, we had shipped a product. We had
25 received laudatory notes from Sun, including from its CEO, and

1 the question at that point was why should we use OpenJDK.

2 And there is some testimony from Mr. Bloch about this
3 e-mail suggesting that in his personal belief, there were some
4 issues; and if they want to use those in cross-examination,
5 they should feel free to use those in cross-examination. But I
6 don't think that this establishes that there is no chance that
7 in 2007, that Google would have used OpenJDK.

8 **THE COURT:** Again, I ask -- and it would help me a
9 great deal, and I can't believe the lawyers don't know the
10 date -- when did the negotiations with Sun crater and Google
11 then make the decision to write the implementing code for the
12 37?

13 **MR. KWUN:** So, again, I apologize, Your Honor. I
14 don't have that date readily at hand, but -- wait a minute.

15 **MR. VAN NEST:** I think Christa knows.

16 **MS. ANDERSON:** Just to double-check, Your Honor, just
17 on the date of the negotiations prerelease of the Android, it
18 does appear, we concur, the formal back-and-forth negotiations
19 ended in May '06. There were some attempts by Sun to revive
20 them in '07 but, you know, the bulk of them were ended by May
21 '06 prior to that release.

22 **THE COURT:** All right. And where's the memo or e-mail
23 where -- inside of Google where they say, "Okay. Those
24 negotiations cratered. We're going -- our solution is to
25 rewrite the implementing code"?

1 **MR. KWUN:** I don't know that we have a formal memo
2 that writes that up.

3 **THE COURT:** Well, I'm asking, why don't you know? Are
4 you saying there is no such memo, or are you saying you just
5 don't know one way or the other?

6 **MR. KWUN:** I don't know one way or the other, but I
7 believe there is not such a memo.

8 **MS. ANDERSON:** Yes. Your Honor, again, I'm sorry to
9 jump in just to provide a little additional detail.

10 There are correspondence internal at both companies at
11 this time, and at Google there are internal correspondence
12 about planning.

13 But as Your Honor may recall from the first trial from
14 Mr. Rubin's testimony, Google had been proceeding on multiple
15 tracks. It was -- at the same time that it was trying to have
16 negotiations with Sun to see if there was a way for a deal to
17 be made that they could work together, they were working on a
18 separate track the entire time to also develop their own
19 implementation so they would not need any license from Sun in
20 case it didn't work out.

21 So there are double tracks going on here, so you're not
22 going to see a "We're doing one thing and then we're going to
23 switch and do a totally different thing." Throughout that time
24 period, they were working on both tracks, and --

25 **THE COURT:** All right. Then help me understand. When

1 did the 37 -- Google's own implementing code for the 37 get
2 written?

3 **MS. ANDERSON:** It was written over the period of time
4 leading up to the release, but I -- I mean, I think it took
5 time to develop and assemble the code because some of it was
6 taken from Apache, et cetera, and over time it was assembled
7 into one full set of class libraries.

8 **MS. CARIDIS:** Your Honor, if I may. Noser, which was
9 a third-party development company that Google hired to help
10 implement the 37 packages, the statement of work for Noser was
11 signed at the end of March in 2007, which was just a mere --
12 which was after the announcement of OpenJDK and which was a
13 couple of weeks before the release of the Java SE class
14 libraries under OpenJDK.

15 **THE COURT:** Wait a minute. I want to write that down.
16 What was -- November -- I'm sorry. Say it again.

17 **MS. CARIDIS:** So the statement of work with Noser
18 and --

19 **THE COURT:** How do you spell Noser?

20 **MS. CARIDIS:** N-O-S-E-R.

21 **THE COURT:** Uh-huh.

22 **MS. CARIDIS:** -- was signed at the end of March in
23 2007.

24 **THE COURT:** And the statement of work said what?

25 **MS. CARIDIS:** The statement of work laid out how Noser

1 was going to implement the 37 packages and where Noser was
2 allowed to take code from, for lack of a better word.

3 **THE COURT:** All right. And when was the OpenJDK as
4 for the -- not for the virtual machine but for the APIs? When
5 did that get announced?

6 **MS. CARIDIS:** It was announced in November. The
7 actual code was released the first week of May in 2007.

8 **THE COURT:** All right. So help me. What I'm trying
9 to do is focus on the scenario, the counterfactual scenario,
10 for a moment to see when it would have come up.

11 All right. So we have -- in '06 we have negotiations for
12 a regular commercial license, and those fail. We then come to
13 November of '06, this announcement about JDK gets made. And
14 let's assume that at that point the counterfactual event
15 occurs, which is -- let's assume that in some other -- in some
16 way the world is informed by the Federal Circuit that declaring
17 code in SSO of the type that's been found to be copyrightable
18 here is copyrightable. So that new fact becomes part of the
19 scenario. That was not then known -- maybe it should have been
20 known, but I'm going to ask you in a minute, Ms. Caridis,
21 whether or not that was expressly known at that time.

22 But let's assume that that was a new fact, a new
23 circumstance. So in light of that new circumstance, what
24 Google is saying is, "Okay. If we had known that then when the
25 announcement came out about OpenJDK with a Classpath exception,

1 knowing that what we were about to do with Noser would be
2 illegal unless fair use, we would have used the Classpath
3 exception."

4 So what do you say to that? It is counterfactual because
5 that did not actually happen, but don't we have to imagine that
6 somehow Google gets informed that what they are about to do
7 would be illegal under Federal Circuit law?

8 All right. So what do you say to that?

9 **MS. CARIDIS:** So a couple things, Your Honor. The
10 first is that, as Your Honor noted, Google was in negotiations
11 with Sun for an extended period of time. They knew they needed
12 a license, and we saw, you know, all these documents come in at
13 the first trial about "we knew we needed a license."

14 There is evidence of Google's that Google saw the
15 copyright notices on these documents. And so I don't think
16 it's fair to say they had no idea what they were doing was
17 wrong based on the say so of --

18 **THE COURT:** No, that's not what I'm saying at all, and
19 I don't think you're quite being fair to the record.

20 What they were negotiating for with Sun was a license that
21 would have allowed them to use the implementing code, for
22 example. So one explanation for what happened is that Sun
23 said, "No, we want lots more money than you're willing to pay."

24 And so then Google said, "Okay. We can't just steal their
25 code. We're going to rewrite the code." And that's why they

1 hired Noser, in order to -- they decided, "As long as we write
2 our own implementing code, it's our original work, our work for
3 hire, and not theirs."

4 So the only part of it that they kept was the declaring
5 code, the lines of declaring code in the SSO. Let's concede
6 all of that.

7 So they did wind up using much less than they were
8 bargaining for with Sun, and maybe they thought in all good
9 faith that that was perfectly legal. I don't know if they had
10 a legal opinion or not, but we don't see any memo saying
11 that -- like we do for these others, we don't see any memos
12 that say that scenario would be a copyright problem.

13 So isn't that one way to look at the evidence here?

14 **MS. CARIDIS:** Well, but, Your Honor, even if you were
15 to look at the evidence that way, the rejection evidence that
16 we see from OpenJDK is about licensing of the OpenJDK license.
17 So even if you were to assume that at that point Google knew
18 that the copyrightability for the implementing code and SSO had
19 been established, that wasn't their concern. There were -- I
20 haven't seen, and maybe I'm missing something, any evidence in
21 the record saying, you know, "We didn't take OpenJDK because
22 this stuff isn't copyrightable."

23 **THE COURT:** All right. So -- but -- all right. To go
24 back over your four documents, though, one says it's a buzz
25 saw. All right.

1 **MS. CARIDIS:** But the testimony, the testimony from --

2 **THE COURT:** What was the testimony?

3 **MS. CARIDIS:** The testimony was, "I had" -- let me
4 read it directly so I don't misquote, Your Honor.

5 **THE COURT:** Uh-huh. Go ahead. This is the testimony
6 of Joshua Bloch; right?

7 **MS. CARIDIS:** Yes, Your Honor.

8 **THE COURT:** Okay.

9 **MS. CARIDIS:** (reading)

10 "Using OpenJDK instead of Harmony was a verboten
11 topic.

12 "And why was it verboten?

13 "Because I'd heard it discussed before and quickly
14 the discussions would always end with, 'You know, we can't
15 do that. Our partners can't use GPL code other than the
16 Linux kernel itself.'"

17 And, Your Honor, Mr. --

18 **THE COURT:** That was talking about OpenJDK?

19 **MS. CARIDIS:** OpenJDK versus Harmony Apache.

20 **THE COURT:** All right. Let's hold that thought.
21 What do you say to that point?

22 **MR. KWUN:** OpenJDK is, first of all --

23 **THE COURT:** It's still hard for me to read. I don't
24 know why I'm having so much trouble reading that.

25 **MS. CARIDIS:** Do you want me to hand up a paper?

1 **THE COURT:** Hand up a copy for me. Thank you.

2 So, Mr. Kwun, you need -- so this witness of yours says it
3 was verboten. Well, it says: (reading)

4 "Jesse, why did you say buzz saw?

5 "Because he mentioned a verboten topic.

6 "What was it --

7 "Using OpenJDK instead of Harmony in Android.

8 "Why did you regard that as verboten?

9 "Because I'd heard it discussed before and quickly
10 the discussions would always end with, 'You know, we can't
11 do that. Our partners can't use GPL code other than the
12 Linux kernel itself.'"

13 All right. So this is testimony --

14 **MS. CARIDIS:** Turn over on the other side of the page,
15 Your Honor, Joshua Bloch.

16 **THE COURT:** -- from Mr. Bloch --

17 **MR. KWUN:** Yeah. This was --

18 **THE COURT:** -- which tends to indicate that at the
19 time they felt they couldn't use OpenJDK. What do you say to
20 that?

21 **MR. KWUN:** So I think ultimately that the point here
22 is that this is cross evidence, not a basis for excluding. It
23 is not indisputable evidence that Google would not have been
24 able to use OpenJDK.

25 **THE COURT:** If you say that again -- you've already

1 said that so many times, it's a broken record.

2 **MR. KWUN:** All right. The other point --

3 **THE COURT:** Both sides want me to throw out each
4 other's entire case basically; and then whenever it's your
5 turn, you say, "Oh, that's for the cross-examination." This is
6 not doing me any good.

7 Maybe I am going to throw all this out. I don't know. I
8 want to understand enough of the merits of it.

9 What are you going to say about this on the merits is what
10 I want.

11 **MR. KWUN:** All right.

12 **THE COURT:** That would help me.

13 **MR. KWUN:** Your Honor, on the merits what he says is,
14 "Our partners can't use GPL." So the class libraries in
15 OpenJDK are licensed under the GPL Version 2 license with the
16 Classpath exception, and the Classpath exception makes all the
17 difference.

18 Now, he does talk about using OpenJDK instead of Harmony,
19 but what he talks about remembering is discussions that
20 partners cannot use GPL code other than the Linux kernel
21 itself. This is depo testimony in 2011 about a single e-mail
22 in 2009 that is two years after the e-mail, two years after the
23 decision was made to use the Harmony class libraries.

24 I think that's scant evidence on which to base a
25 conclusion that it is impossible that Google would have used

1 OpenJDK for the class libraries in 2007.

2 And you have a single page of the depo there, but what was
3 submitted along with that in the *motion in limine* papers was it
4 was a set of four pages, I believe, because it was a
5 mini-transcript. And I'm just going to read a few quotes
6 from -- about the same e-mail that he is discussing there from
7 the following pages:

8 On page 207 of Mr. Bloch's deposition transcript, so the
9 following page, the question is asked: (reading)

10 "Did you have follow-up discussions with him about
11 this?"

12 So that's follow-up discussions with Jesse Wilson about
13 this e-mail. (reading)

14 "Not that I recall.

15 "Did you ever talk to him again about this e-mail
16 exchange?

17 "Not that I recall."

18 The following page, 208: (reading)

19 "Did you have follow-up discussions with others about
20 whether OpenJDK could be used on Android in the wake of
21 this e-mail?

22 "Not that I recall."

23 And so really what we --

24 **THE COURT:** Well, is there a single e-mail anywhere in
25 the entire Google universe where it says, "Look, we could use

1 OpenJDK for the 37 or any of the APIs because that's got the
2 Classpath exception, but we couldn't use it for the virtual
3 machine and so that's the problem"? I mean, that's the
4 distinction you're trying to draw now, right, or one of the
5 distinctions?

6 **MR. KWUN:** Yes, Your Honor.

7 **THE COURT:** All right. But you don't have a single
8 e-mail from the time in question that recognized that
9 distinction.

10 **MR. KWUN:** We do. Just a second, Your Honor.

11 **THE COURT:** You do? All right. Good. I'd like to
12 see it.

13 And I'd like you to know under Rule 403, a judge can
14 exclude and not let the jury hear a weak argument.

15 **MR. KWUN:** Yes, Your Honor.

16 **THE COURT:** Because it would take a lot of time, and
17 even -- you know, I have to balance a lot of factors; but under
18 Rule 403, the judge has got a lot of discretion. So just
19 because some Eighth Circuit judge said that you've got to let
20 people cross-examine all day long, no. Rule 403 is what
21 governs here.

22 **MR. KWUN:** Understood, Your Honor.

23 **THE COURT:** All right. So what is your -- give me
24 your -- hand me a copy of what you're showing me.

25 **MR. KWUN:** This is Trial Exhibit 154. It was cited in

1 their *motion in limine* papers.

2 And just to give a little bit of context so that we
3 understand the timing, this is November 12th, 2006. This is
4 the day before the announcement was made public that they would
5 be open sourcing OpenJDK.

6 **THE COURT:** Okay.

7 **MR. KWUN:** If you look at the bottom of the first
8 page, you can see an e-mail from Simon Phipps. He was the
9 chief open source officer at Sun, and he is sending an e-mail
10 to a mailing list, "Trusted Friends," to let people know that
11 the following day Sun would be making this open source
12 announcement.

13 And this e-mail apparently went -- that "Trusted Friends"
14 e-mail list seems to have included Chris DeBona -- which is
15 right above the Simon Phipps e-mail header -- Chris DeBona, who
16 is a Google employee who works on open source projects at
17 Google, and he passes it along to Andy Rubin and to the Open
18 Source Team, and he says, "FYI."

19 So after that, let's go to the top of the e-mail, and we
20 can see that this is an e-mail thread between Andy Rubin, Jason
21 Harinstein, and Amin Zoufonoun. And what Andy Rubin says,
22 seemingly forwarding the news that Chris DeBona forwarded that
23 came from Simon Phipps, is that: (reading)

24 "Sun open sources Java. This has got to bring the
25 price down."

1 So whether or not there were formal negotiations going on
2 in November 2006, there seemed to be some notion of some
3 discussions going on.

4 But what he says below that is: (reading)

5 "We still need Skelmir because GPL license," Sun's
6 license, "doesn't work for us."

7 Skelmir, remember, is a virtual machine technology
8 company. So what Andy Rubin is saying is that he has read this
9 release. He understands the distinction between the license
10 for the virtual machine and the license for the class
11 libraries. And he says that, "Well, gee. You know, if we use
12 the GPL2 license for the virtual machine, that doesn't work for
13 us."

14 So I will concede, Your Honor --

15 **THE COURT:** That's a lot of spin, don't you think? It
16 doesn't say that.

17 **MR. KWUN:** Well, Your Honor, that's why we'll need to
18 put on a witness and have some testimony about that.

19 **THE COURT:** Did anyone testify about that?

20 **MR. KWUN:** About Skelmir?

21 **THE COURT:** Yeah.

22 **MR. KWUN:** There was --

23 **THE COURT:** No. I mean about this very e-mail.

24 **MR. KWUN:** This e-mail must have been discussed in
25 some sense, but not on this topic. It was an admitted trial

1 exhibit at the trial, but there was no testimony directly on
2 that point because this issue was not front and center during
3 the first trial.

4 What was front and center, Your Honor, though, was
5 OpenJDK. And, indeed, Oracle witnesses during direct
6 examinations offered testimony about OpenJDK, about the fact
7 that it was available as an open source license for Google,
8 that Google could have adopted that license and chose not to
9 adopt that license.

10 So the testimony that they offered before about OpenJDK,
11 they would now like to prevent us from offering our view of
12 that evidence.

13 **THE COURT:** All right. Do you have any other
14 documents that at the time in question --

15 **MR. KWUN:** Sure.

16 **THE COURT:** -- allegedly drew a distinction between
17 Classpath for API versus not Classpath for virtual machine?

18 **MR. KWUN:** Sure. So if you look at -- this is at
19 trial exhibit -- oh, I'm sorry, Your Honor; I'll hand up a
20 copy -- Trial Exhibit 230. This was also cited in their motion
21 papers.

22 Mr. Rubin talking with Bob Lee, cc'ing others on the
23 Android team, says: (reading)

24 "As far as GPL'ing the VM," the virtual machine,
25 "everything that is linked with the VM would get

1 infected."

2 So that shows an understanding of the viral effect of the
3 GPL license. And he says that: (reading)

4 "The problem with GPL-embedded systems" -- "in
5 embedded systems is that it's viral, and that that creates
6 issues for OEMs. We are building a platform where the
7 entire purpose is to let people differentiate on top."

8 He says: (reading)

9 "Sun has a different license for its library for SE
10 and ME."

11 He says: (reading)

12 "The SE library is LGPL. The ME library is GPL."

13 So --

14 **THE COURT:** What is "LGPL"?

15 **MR. KWUN:** "LGPL" stands for the lesser GNU public
16 license. That's actually --

17 **THE COURT:** Lesser what?

18 **MR. KWUN:** The lesser GPL license.

19 **THE COURT:** Uh-huh.

20 **MR. KWUN:** So that's not actually entirely correct.
21 The LGPL license, like the Classpath exception, is designed to
22 provide an exception for code that links with a library.
23 Actually the SE library was due to be released -- or at that
24 point had been released -- this is August of 2007 -- under the
25 Classpath license, not the LGPL license.

1 So Mr. Rubin misspoke, but the thrust of what he is saying
2 is that the SE library is released under an open source license
3 with a linking exception; whereas, the ME library is released
4 under one that does not have a linking exception. That's what
5 it means when it says, "The SE library is LGPL. The ME library
6 is GPL."

7 And he says that means that anything that links with the
8 ME license gets infected. So he has now mentioned the problem
9 of infection with a GPL VM and the problem with infection with
10 a GPL ME library.

11 What does he say about the SE library? He says the SE
12 library -- and he's talking about OpenJDK because he's talking
13 about the open source implementation from Sun -- and the SE
14 library is not optimized for embedded systems.

15 He's gone out of his way to discuss the problem with the
16 viral effect for the VM and for the ME library. He has
17 discussed the SE library. He has said that it is subject to a
18 linking exception, and then he mentions nothing about a viral
19 infection problem for the SE library. He instead says that
20 there is a technical problem, the technical problem being that
21 it is not optimized for embedded systems.

22 **THE COURT:** What does that mean?

23 **MR. KWUN:** The SE library comes from Java
24 Standard Edition, which largely targets desktops and servers.
25 And so if you were going to be in an environment where you are

1 on a CPU that is lower power and that is battery operated, has
2 a small battery because it has to fit in your pocket, you're
3 going to have special needs. You're going to have to have a
4 library that is designed to run quickly on a low-powered
5 processor, one that doesn't take up too much memory because you
6 can't support too much memory on pricing the product, and one
7 that isn't going to consume too much battery power.

8 **THE COURT:** What does "embedded" mean?

9 **MR. KWUN:** An embedded system is a system in which the
10 software is embedded into a hardware device. So, for example,
11 in your car you have a computer system. Most people don't
12 think of their car as being a computer, but there's probably
13 many computers inside your car. Those are embedded systems.

14 The other thing that I'll point to here is at the bottom
15 of this e-mail the P.S., Andy Rubin -- this is in August of
16 2007 -- (reading)

17 "We negotiated nine months with Sun and decided to
18 walk away after they threatened to sue us over patent
19 violations."

20 He doesn't talk about threatened lawsuits over using the
21 APIs from the class libraries. He talks about patent
22 violations. That was the focus of the discussions with Sun.
23 And, of course, we know now that those patent claims were not
24 meritorious.

25 **THE COURT:** So I'd asked you if you had a document

1 that drew a distinction between the virtual machine and the
2 APIs as it related to OpenJDK, and so you're saying that this
3 supports that distinction; right? Is that what you're saying?

4 **MR. KWUN:** Yes.

5 **THE COURT:** All right. So --

6 **MR. KWUN:** Yes, Your Honor. It's not a conclusive
7 e-mail, just as their e-mail is not conclusive, but there is a
8 discussion going on of three different systems here: A VM, a
9 virtual machine; SE libraries; and ME libraries.

10 And there is a clear discussion of the different licensing
11 regimes involved, and there is a clear discussion of the viral
12 effect, which is -- which he mentions only with regard to the
13 GPL product.

14 **THE COURT:** Well, which is the one in the -- which in
15 the body of it? It does say "New OpenJDK" up at the top, but
16 where does OpenJDK get referenced in the body of the e-mail?

17 **MR. KWUN:** It does not come up by name. What he says,
18 though, is -- in the third paragraph from Andy Rubin, he says:
19 (reading)

20 "Finally Sun has a different license for its library
21 for SE and ME."

22 So if that's all you read, you could be thinking he could
23 be talking about the commercial license, the closed-source
24 versions of SE or ME, or the open versions.

25 But what he then says is that the SE library is LGPL; the

1 ME library is GPL. Those are open source licenses. The only
2 open source versions of SE and ME are the ones that -- excuse
3 me -- the only open source version of SE released by Sun, so
4 the only thing he could be referring to there is OpenJDK.

5 **THE COURT:** What again does "LGPL" mean?

6 **MR. KWUN:** "LGPL" is a Free Software Foundation
7 written license that is referred to as the lesser general
8 public license, and it's so-called because it is like the
9 general public license but it is less restrictive. It limits
10 the copyright effect -- the copyleft effect that is inherent in
11 the pure GPL license.

12 **THE COURT:** Well, if the GPL -- okay. All right.

13 **MS. CARIDIS:** Your Honor, I have two documents that
14 might be responsive and helpful for you.

15 **THE COURT:** Please. All right.

16 **MS. CARIDIS:** Your Honor asked a couple times whether
17 or not there is any document or memo internal to Google showing
18 that they could have used OpenJDK class libraries. I submit
19 that there might be, but Google is hiding behind privilege to
20 show them to us.

21 And I'm going to project -- and I have a copy if you'd
22 like a copy, but this is --

23 **THE COURT:** Give me a copy of this. It will be easier
24 for me to read.

25 (Pause in proceedings.)

1 **MS. CARIDIS:** And, again, I apologize for the size,
2 Your Honor.

3 **THE COURT:** It's pretty small, but which one do I look
4 at?

5 **MS. CARIDIS:** So if you look at the second entry on
6 the second page, Your Honor.

7 **THE COURT:** 4715?

8 **MS. CARIDIS:** Yes, Your Honor.

9 This is an entry and there are a couple related ones that
10 follow on the same day as the "buzz saw" e-mail, and if you
11 look at the description of 4715, it says: (reading)

12 "E-mail seeking advice of counsel re use of OpenJDK
13 licensing in Android and mixing of GPL and Apache licensed
14 code."

15 Your Honor, we don't know what this document says because
16 Google is claiming privilege, but now they are also, on the
17 other hand, claiming that there was never a licensing concern
18 and giving other reasons for their rejection of OpenJDK.

19 (Pause in proceedings.)

20 **THE COURT:** Okay. You said there was another one.

21 **MS. CARIDIS:** Yes, Your Honor. Mr. Kwun said a moment
22 ago in response to your counterfactual about, "Well, what if
23 everybody knew in 2008 that these APIs were copyrighted?"
24 Apache knew, Your Honor, that the APIs were copyrighted. And
25 I'm going to hand up to you a document that was produced in the

1 first part of this case, and I'm going to direct you to the
2 second page, Your Honor.

3 And this is an e-mail from an Apache employee who
4 ultimately went to work for Google. And about three quarters
5 of the way down the page he says: (reading)

6 "Simply by implementing a class with the same
7 signature of another in another name space and simply by
8 looking at available Java docs could be considered
9 copyright infringement even if the implementation is clean
10 room. So we are, in fact, infringing on the spec lead
11 copyright if we distribute something that has not passed
12 the TCK, and we know that. This makes us already doing
13 illegal things. In fact, Android using Harmony code is
14 illegal as well."

15 **THE COURT:** So this is when?

16 **MS. CARIDIS:** So this is in early 2008, Your Honor.

17 **THE COURT:** This is internal to Apache or what?

18 **MS. CARIDIS:** This is from an employee who was at
19 Apache at the time and who has since -- and he joined Google in
20 2010.

21 **THE COURT:** What was that person's name?

22 **MS. CARIDIS:** Stefano Mazzocchi.

23 **THE REPORTER:** Could you please spell that?

24 **MS. CARIDIS:** S-T-E-F-A-N-O, M-A-Z-Z-O-C-C-H-I.

25 And, Your Honor, if you're actually -- I can direct your

1 attention to one line above where I started, which is about
2 halfway down the page. This, again, is Mr. Mazzocchi.

3 **THE COURT:** What year did he go to Google?

4 **MS. CARIDIS:** 2010.

5 **THE COURT:** And when was the product launched?

6 **MS. CARIDIS:** The product was launched late 2008.

7 He also, Your Honor, says --

8 **THE COURT:** This is April 17th, 2008. So he is saying
9 to somebody, "This makes us already doing illegal things."

10 That is -- that's internal to Apache?

11 **MS. CARIDIS:** Yes, Your Honor.

12 **THE COURT:** All right. Did -- okay. So back in 2008
13 did anybody at Apache say to Google the same thing, pass that
14 information on?

15 **MS. CARIDIS:** Your Honor, I don't know this. I wanted
16 to show you in response to Mr. Kwun's statement that Apache
17 thought what it was doing was okay.

18 **THE COURT:** You did say something like that, so what's
19 your answer to this e-mail?

20 **MR. KWUN:** Well, apparently there was at least one
21 person who expressed a dissenting view at Apache. That's all I
22 can say having not seen this e-mail in briefing, but that's all
23 I can say.

24 **THE COURT:** Well, do you have an e-mail within Apache
25 that goes the other way?

1 **MR. KWUN:** I don't, Your Honor. I do, however, have
2 their course of conduct, which was that they continued with the
3 Apache Harmony project for many years after this.

4 **THE COURT:** But, look, people -- look what happened in
5 Wall Street in 2008. I mean, people do things all the time
6 that are completely illegal, and you can't after the fact say
7 there must be some kind of presumption that they were acting in
8 good faith. I don't think that's the law, and I don't think
9 there's any such presumption.

10 **MR. KWUN:** I don't think --

11 **THE COURT:** Maybe Google knew good and well and just
12 never put it in writing that what Apache was doing was, as this
13 guy said, illegal.

14 **MR. KWUN:** I agree that there's not a presumption,
15 Your Honor, but I do think that the testimony from our
16 witnesses -- and, indeed, we have an expert witness who we --

17 **THE COURT:** Experts will say anything. Come on.

18 **MR. KWUN:** He's largely actually a fact witness, if I
19 can explain. He may not be able to testify at trial due to
20 medical issues, but we summarized his testimony in a filing for
21 Your Honor, and it's Rick Cattell. Rick Cattell was an
22 employee of Sun. He was a distinguished engineer at Sun, and
23 he worked with computer scientists around the world. And his
24 testimony in his expert report is that the general
25 understanding of computer scientists that he worked with was

1 that reimplementing APIs was fine to do.

2 **THE COURT:** Did he say that to Google at the time? I
3 mean, look, you've got -- you've got to -- you've got a
4 document in '09, an e-mail seeking advice of counsel on
5 something that looks like it's pretty close on point.

6 **MR. KWUN:** So, Your Honor, I don't think that we can
7 tell what it says. And, Your Honor, we're not relying on that
8 e-mail, so the cases that Oracle cites saying that you cannot
9 rely on a defense of advice of counsel --

10 **THE COURT:** I don't know how we're going to deal with
11 that. So maybe you're not going to rely on advice of counsel,
12 but let's say we get into the trial and your argument to the
13 jury is, "Hey, everybody thought this was okay." And so then
14 Oracle points out to the jury, "Well, look. They asked their
15 lawyer in an e-mail on this very question, and what was the
16 answer? We don't know because of privilege."

17 **MR. KWUN:** Well, Your Honor, we don't even know that
18 it's the same question. All we have is a vague description
19 that clearly is talking --

20 **THE COURT:** Well, it's your description. This is your
21 privilege log.

22 **MR. KWUN:** It is our privilege log, and --

23 **THE COURT:** So don't complain about vagueness if it's
24 your vagueness.

25 **MR. KWUN:** But, Your Honor, I don't think that this

1 is -- first of all, I don't think it's evidence; and, second of
2 all, I don't think that it's clear that that's what it's
3 referring to.

4 And, finally, Your Honor, it's privileged. So to the
5 extent that we were to try to figure out what it was talking
6 about, we claim privilege.

7 **THE COURT:** Can a lawyer make -- I'll give you a
8 hypothetical. Can a lawyer make a counterfactual argument and
9 say that everyone thought -- well, at the time thought that
10 what we were doing -- this is not even counterfactual. Can a
11 lawyer make an argument to the jury, "Hey, we all thought this
12 was perfectly okay," and ignore the fact that the lawyers told
13 them at the time that it was not okay just because that's
14 privileged?

15 **MR. KWUN:** Under that exact fact scenario, no,
16 Your Honor. I mean, there's an ethical duty not to suborn
17 perjury.

18 **THE COURT:** Well, then, possibly you ought to go back
19 and look at these and make sure that whatever testimony you're
20 going to give can actually be squared with what the lawyer said
21 at the time. You don't have to answer that, but that's a
22 problem for you. That's an ethical problem.

23 All right. I need to move on here, and we don't have --
24 I've got to leave today at about 12:00 o'clock. So it's almost
25 9:00 o'clock -- it's almost 10:00 o'clock now.

1 **MS. CARIDIS:** Your Honor, may I make a brief legal
2 point quickly to respond?

3 **THE COURT:** All right.

4 **MS. CARIDIS:** Mr. Kwun keeps talking about
5 indisputable is the standard here. Indisputable is not the
6 standard. The record that we have is simply that Google's
7 experts are going to testify about this counterfactual.

8 **THE COURT:** Is this your point number two?

9 **MS. CARIDIS:** No, no. This is the end of point number
10 one, and I promise to be super brief.

11 **THE COURT:** All right.

12 **MS. CARIDIS:** *Joiner* teaches us, the Supreme Court
13 says: (reading)

14 "Nothing in either *Daubert* or the Federal Rules of
15 Evidence requires a District Court to admit opinion
16 evidence that is connected to existing data only by the
17 *ipse dixit* of the expert."

18 That's all we have here. All we have are their experts
19 saying, "We've done it now. We could have done it back then.
20 We're ignoring all the facts."

21 The standard here is not indisputable. We are talking
22 about *Kumho* and *Joiner* and *Daubert*, and the expert's
23 supposition that we have is not supported by the record and is
24 not sufficient under FRE 702.

25 **THE COURT:** Well, I'm thinking 403 is a more apt --

1 I'm not saying I'm going to rule it out, but all the time
2 judges say, "Look, that's going to take so much time to get
3 into it, it's going to take so many days of testimony; and at
4 the end of it all, what does it prove and is it a good enough
5 point to take up that much time?" That's a somewhat -- that's
6 a different analysis, but --

7 **MS. CARIDIS:** And that's absolutely true, Your Honor.

8 And here we have nine different experts, including the
9 Rule 706 expert, providing opinions relating to this
10 speculative counterfactual. So I think that absolutely
11 proves -- or would support a 403 waste-of-time, minitrial,
12 sideshow issue.

13 **THE COURT:** I think the same thing is true with some
14 of your experts, like the one that says 37 percent goes to one
15 little tiny piece of the gigantic machine. Think about that.

16 All right. We're going -- what are your second and third
17 points?

18 **MS. CARIDIS:** Sure. So my second point, I can be very
19 brief. During discovery, Oracle asked Google an interrogatory
20 saying, "State your bases for fair use." And in response,
21 Google made a single point about OpenJDK; and that was, "You
22 released OpenJDK, and that fragmented Java. So to the extent
23 that Android is fragmenting Java, you can't blame us because
24 you did it yourself." So the only basis disclosed to rely on
25 OpenJDK during discovery for fair use was about fragmentation.

1 Since fact discovery closed, Google has added three
2 additional fair use arguments relating to OpenJDK. So from a
3 procedural standpoint -- not even approaching the merits, from
4 a procedural standpoint, it's improper.

5 Early on in this case --

6 **THE COURT:** Just tell me what the three are.

7 **MS. CARIDIS:** One, releasing OpenJDK shows that Sun
8 consented to Google's copying; two, releasing OpenJDK is
9 relevant to factor two of fair use; and, three, OpenJDK
10 destroyed the potential market for Java SE.

11 **THE COURT:** All right. What is your third point going
12 to be?

13 **MS. CARIDIS:** I will also note, Your Honor, we briefed
14 this for you yesterday, aside from being procedurally improper
15 because they weren't disclosed before, each of those three
16 would do great harm to open source and are also without merit.

17 **THE COURT:** When did those new three things come into
18 the case?

19 **MS. CARIDIS:** So the first two, the consent and the
20 factor two, came in during Google's opposition to the present
21 MIL.

22 **THE COURT:** The present what?

23 **MS. CARIDIS:** *Motion in limine.* Pardon.

24 **THE COURT:** It wasn't surfaced way back? Did you ask
25 the right question way back then?

1 **MS. CARIDIS:** Yes, Your Honor.

2 **THE COURT:** Sometimes you don't ask the right
3 question. What was the question that you asked? Why JDK is
4 relevant?

5 **MS. CARIDIS:** No, Your Honor. We asked for all bases
6 for their fair use defense.

7 **THE COURT:** All right. And they said JDK slash
8 fragmentation?

9 **MS. CARIDIS:** Yes, Your Honor.

10 **THE COURT:** And did not say JDK slash all those other
11 things, consent?

12 **MS. CARIDIS:** Yes, Your Honor.

13 **THE COURT:** So you're saying that they failed to
14 disclose it.

15 **MS. CARIDIS:** Yes, Your Honor. And previously in this
16 case you have cautioned the parties to make sure that their
17 interrogatory responses are full.

18 **THE COURT:** All right. Okay. When we come back, are
19 you arguing this one, too?

20 **MR. KWUN:** Yes, Your Honor.

21 **THE COURT:** All right. When we come back, we'll
22 get -- in ten minutes or so we're going to get your version of
23 what happened on that part.

24 Did I put on for today's hearing another motion on the
25 other products?

1 **MS. CARIDIS:** Yes, Your Honor.

2 **MR. KWUN:** One more *motion in limine*.

3 **THE COURT:** I hope we can get to it, but we're running
4 out of -- we've already taken up two hours on one third of your
5 motions.

6 **MS. CARIDIS:** The other two are quick.

7 **THE COURT:** I hope that the Court of Appeals has mercy
8 when they look at how much work is required to go through just
9 one third, and I'm not even through with it yet. I'm still
10 trying to understand it. And it's me and a tiny staff. Look
11 at the gigantic teams that you have. So I hope that this is
12 all taken into account in the next appeal.

13 All right. We'll take a few minutes.

14 (Recess taken at 9:53 a.m.)

15 (Proceedings resumed at 10:12 a.m.)

16 **THE COURT:** All right. Back to work. Have a seat.

17 At sometime around 11:00, I have a case management
18 conference. It won't take long, and I'll just let you-all
19 continue to sit there while I take two or three minutes and do
20 the case management conference.

21 All right. Let's hear from Mr. Kwun.

22 **MR. KWUN:** Yes, Your Honor. So on the issue of what
23 we disclosed in our interrogatory response, this is Exhibit 21
24 from the Silverman declaration, which has the First
25 Supplemental Responses and Objections to Plaintiff's

1 Interrogatories Number 38 through 44. And the fair use
2 interrogatory is Interrogatory Number 40, and it's -- actually,
3 it runs on for several pages, but I want to read just a couple
4 of points.

5 **THE COURT:** The question runs on for several pages or
6 the --

7 **MR. KWUN:** The response.

8 **THE COURT:** The response. All right.

9 **MR. KWUN:** So it's not like the response just says
10 "fragmentation" and that's it, but I just wanted to make that
11 clear in case it wasn't clear.

12 **THE COURT:** Well --

13 **MR. KWUN:** But --

14 **THE COURT:** -- counsel said it only said
15 fragmentation, the original answer.

16 **MR. KWUN:** We said: (reading)

17 "Google's use of the SSO and Android did not harm the
18 market for licensing the SSO. Prior to Oracle's purchase
19 of Sun, Sun/Oracle, Sun's licensing practices did not
20 preclude Google from using the SSO and Android."

21 That's one of the things we disclosed.

22 A little further down in the response we said, and I quote
23 again: (reading)

24 "In addition, by the time Android was released,
25 Sun/Oracle had already enabled the fragmentation of the

1 Java SE platform by giving away the SSO for free without
2 any restrictions on fragmentation through OpenJDK and the
3 associated GPL V2 with the Classpath exception open source
4 license which does not require compatibility."

5 That's --

6 **THE COURT:** But Ms. Caridis said that you did bring up
7 fragmentation earlier.

8 **MR. KWUN:** Yes, Your Honor.

9 **THE COURT:** All right. So that sounds like
10 fragmentation.

11 **MR. KWUN:** The fragmentation is the key point that we
12 mentioned there, but we have disclosed more generally the
13 notion that the open source release of OpenJDK precludes the
14 argument of market harm.

15 And the reason why we mentioned fragmentation --

16 **THE COURT:** Hand up to me your answer, the original
17 answer, so I can read that for myself.

18 All right. I have the original answer here.

19 **MR. KWUN:** Well, this is the first supplemental
20 response. I believe the original answer --

21 **MS. CARIDIS:** That's what I handed up.

22 **MR. KWUN:** Actually, this replaced the original
23 answer, but this is the --

24 **THE COURT:** I want the one that --

25 **MS. CARIDIS:** That's the one that he was reading from,

1 Your Honor.

2 **THE COURT:** What is the date of this one?

3 **MR. KWUN:** I believe the date of this -- actually, I
4 don't know, Your Honor.

5 **MS. CARIDIS:** It's December 16th, 2015.

6 **THE COURT:** Is that after the discovery cutoff?

7 **MS. CARIDIS:** That's on the day of fact discovery
8 cutoff.

9 **THE COURT:** Well, which is the one that you want to
10 hold him to? Is it this one or --

11 **MS. CARIDIS:** That one, Your Honor.

12 **THE COURT:** You're happy to let them bring up whatever
13 is in here?

14 **MS. CARIDIS:** Absolutely.

15 **MR. KWUN:** So where I was reading from, Your Honor, is
16 what is page 13 of the first supplemental response; and if
17 you -- just so that we know what this is responding to, page 9
18 is where the interrogatory appears.

19 **THE COURT:** All right. Let's look at that.

20 Number 40: (reading)

21 "To the extent you contend that your use of any
22 aspect of the 37 Java API packages constitutes fair use,
23 state in detail the factual bases for that contention."

24 All right. So then we go to --

25 **MR. KWUN:** And, first of all, Your Honor, since we

1 have already had an entire trial where a lot of facts were
2 disclosed, if you go further down page 9, we state that:
3 (reading)

4 "In support of this contention, Google reserves the
5 right to rely upon all facts set forth in the previous
6 trial record."

7 Because, of course, the purpose of a contention
8 interrogatory is to make sure that there aren't facts that are
9 surprises. And the interrogatory is directed at our factual
10 contentions or our factual bases for our fair use argument, not
11 our legal bases.

12 So we understood that that which was disclosed in the
13 prior trial, which would include testimony from Oracle
14 witnesses, including Larry Ellison, their CEO, that OpenJDK was
15 an available license in 2007.

16 **THE COURT:** I don't know. Can you really do that? I
17 mean, can you just say, "We rest on the trial record. Next
18 question"?

19 **MR. KWUN:** Well, Your Honor, we actually had
20 back-and-forth discussions with Oracle on this point, and we
21 agreed that the purpose of the contention interrogatories was
22 to avoid new facts appearing that were surprises; that we had
23 had full discovery before --

24 **THE COURT:** Show me the e-mail that says that.

25 **MR. KWUN:** I don't have that e-mail with me,

1 Your Honor.

2 **THE COURT:** Then it doesn't count.

3 **MR. KWUN:** Okay.

4 **THE COURT:** I told the lawyers, if you're going to do
5 this, you have to bring the e-mail so that --

6 **MR. KWUN:** The point I would make, Your Honor, is that
7 we have that in our response, and there is no e-mail that has
8 been shown to you today saying that that is not proper, and
9 there was no motion made saying that was not proper.

10 **THE COURT:** Look, I can't do what you just said. What
11 you're saying is it's just -- you could just say, "Somewhere in
12 the record, in some deposition somewhere in this case there are
13 facts. We rely upon all depositions. We rely upon all trial
14 testimony." That's not specific enough. The point of an
15 interrogatory is to give the other side what your arguments are
16 going to be.

17 **MR. KWUN:** Well, the other thing I'll --

18 **THE COURT:** Not to -- I don't buy that argument it's
19 just to avoid disclosing new facts unless they did the same
20 thing. I don't know. I'm not going -- I'm just going to rule
21 on it the way it should have been done.

22 Anyway, you went on for page after page laying out your
23 argument.

24 **MR. KWUN:** And --

25 **THE COURT:** All right. So where do you -- where

1 did -- let's --

2 **MR. KWUN:** The factual basis for OpenJDK is on
3 page 13, and first on lines 15 and 16 we note that Sun's
4 licensing practices did not preclude Google from using the SSO
5 in Android. And starting on page 24 we note that Sun gave away
6 the SSO for free without any restrictions on fragmentation
7 through OpenJDK and the associated license for the libraries.

8 **THE COURT:** Lines 15 and what, 16?

9 **MR. KWUN:** So 15 and 16 was the first point. That's
10 in what is the third --

11 **THE COURT:** Let me read it out loud. (reading)

12 "Prior to Oracle's purchase of Sun, Sun/Oracle,
13 Sun's" --

14 Why is it written that way?

15 **MR. KWUN:** That was probably a typo, Your Honor.

16 **THE COURT:** It's got the word "Sun" three times in
17 four words. Anyway: (reading)

18 "... Sun/Oracle, Sun's licensing practices did not
19 preclude Google from using the SSO in Android. To the
20 contrary, Sun/Oracle's business model was to promote the
21 widespread and free use of the Java language and the
22 associated APIs, including the SSO, and to compete on
23 implementation for those APIs, including the
24 implementation of the 37 API packages."

25 Next bullet point: (reading)

1 "Google's use of the SSO in Android also did not harm
2 the market for the SSO by fragmenting the Java SE platform
3 because by the time Android was released, Sun/Oracle had
4 already fragmented the Java SE platform itself by creating
5 separate versions of Java."

6 It goes on to talk about fragmentation, fragmentation
7 through the OpenJDK.

8 It also says: (reading)

9 "Sun's other Java platforms, Java ME, were fragmented
10 before Android as witnesses testified to in deposition."

11 **MR. KWUN:** And then, Your Honor, on the next page, on
12 page 14, in the third bullet point: (reading)

13 "There is no evidence that any market harm or lost
14 business opportunity is due to Android's use of Java" --
15 or, excuse me -- "Android's use of the SSO. Any harm is
16 due to flaws in Oracle's own products or strategies or
17 many desirable aspects of" -- excuse me -- "desirable
18 attributes of Android that have nothing to do with SSO.
19 One of Oracle's strategies was open sourcing Java SE using
20 OpenJDK."

21 So we have disclosed OpenJDK. We've disclosed their
22 licensing practices. We've disclosed that the harm was caused
23 by their strategies and products, not by our actions.

24 **THE COURT:** But other than fragmentation, what are you
25 talking about that Sun did?

1 **MR. KWUN:** Well, Your Honor, we talk about Sun's
2 licensing practices, which didn't preclude us from using the
3 SSO, and that certainly would include the fact that OpenJDK
4 allows us to use the SSO.

5 We talk about their own products and strategies causing
6 any alleged harm.

7 **THE COURT:** I'm still very concerned about that. You
8 want to put on some lawyer; right? Some lawyer --

9 **MR. KWUN:** We have --

10 **THE COURT:** Has that lawyer reviewed the stuff that
11 you're withholding?

12 **MR. KWUN:** No, Your Honor.

13 **THE COURT:** Well, then, maybe they're inconsistent.
14 Maybe your lawyer is a paid gun who's coming in here to say
15 something inconsistent with what the lawyer said at the time.

16 **MR. KWUN:** Well, Your Honor, we're not offering him to
17 offer a legal opinion, of course, and we're offering a few
18 witnesses on this point. We're offering Dr. Astrachan, who is
19 a technical expert, to offer technical opinions.

20 We're offering Andrew Hall, who is an open source
21 licensing expert, to help guide the jury through some of these
22 open source licenses, which are not going to be familiar
23 concepts to them. These notions like some of the ones we've
24 been discussing this morning about how these licensing regimes
25 work, I think it's going to be counterintuitive for some jurors

1 that it would make commercial sense for a company to release a
2 product for free, including source code, whether it's subject
3 to restrictions or not. So he's going to help explain why
4 companies do that and what the commercial benefits are to the
5 companies that do that.

6 He's also going to discuss the difference between the
7 various licenses, which is necessary because of the attempts to
8 confuse the GPL2 license, which applies to, for example, the
9 virtual machine, and the GPL2 license with the Classpath
10 exception, sometimes referred to as the Classpath license,
11 which applies to the Java SE class libraries in OpenJDK.

12 And the other thing is that Mr. Hall is not just an
13 attorney who practices in the field of open source licensing.
14 He's also a trained computer scientist. And so the exception
15 that we're talking about here is sometimes referred to as a
16 linking exception. "Linking" is a computer science term that
17 explains how you can combine two different software modules to
18 work together in a certain way. And Mr. Hall is, by virtue of
19 the fact that he practices in open source licensing and has a
20 technical background, well-suited to offer testimony that ties
21 those two together.

22 **THE COURT:** Ms. Caridis, what were the three things
23 that you said you wanted to have excluded?

24 **MS. CARIDIS:** The third one was Mr. Hall, Your Honor.

25 **THE COURT:** No. You said the fragmentation was

1 okay --

2 **MS. CARIDIS:** Oh.

3 **THE COURT:** -- but then they added in three things.

4 **MS. CARIDIS:** Yes. Sorry, Your Honor. Factor --

5 **THE COURT:** What were the other?

6 **MS. CARIDIS:** Factor two, that Google's attempt to
7 rely on release of JDK under -- as relevant to factor two of
8 fair use was the first one.

9 **THE COURT:** Was that added later?

10 **MS. CARIDIS:** That was added in the opposition to the
11 *motion in limine*.

12 **THE COURT:** All right. Factor two, OpenJDK.

13 All right. What was the next one?

14 **MS. CARIDIS:** The next one was that by Sun releasing
15 OpenJDK, Sun consented to Google's copying. Of course, you
16 know, there's no express or implied license defense in this
17 case, but they've said that our releasing of a licensed version
18 of the class libraries showed that we consented to the copying.

19 And the third one, Your Honor, is that Sun's releasing of
20 OpenJDK destroyed the market for Java SE.

21 **THE COURT:** Isn't that the same thing as
22 fragmentation?

23 **MS. CARIDIS:** No, Your Honor. We made very clear in
24 the briefing, especially the briefing yesterday, we are not
25 moving to preclude fragmentation.

1 **THE COURT:** I know, but isn't the last point very
2 close to fragmentation?

3 **MS. CARIDIS:** They are trying to argue basically that
4 the release of OpenJDK destroyed the market value for Java SE,
5 which is separate from fragmenting the Java SE platform.

6 **THE COURT:** What is their argument that it destroyed
7 that market?

8 **MS. CARIDIS:** Their argument is because we released a
9 version of the Java SE platform for free, even though it has a
10 very specific license attached to it, they somehow speculate
11 we've destroyed the market for Java SE, even though Oracle
12 continues to --

13 **THE COURT:** Well, how would it have been destroyed
14 under the Google theory?

15 **MS. CARIDIS:** Honestly, I think you would have to ask
16 Mr. Kwun that.

17 **THE COURT:** I mean, you must have read what they say.
18 They've got to have a reason.

19 **MS. CARIDIS:** Their reason, Your Honor, is because you
20 offered a free option even though it was licensed. Nobody
21 would have possibly paid for it ever again, which is just not
22 true.

23 **THE COURT:** Do you have examples where it has been
24 paid for?

25 **MS. CARIDIS:** Your Honor, I can tell you that -- I

1 don't have the document in front of me but since 2010, Oracle
2 has made well over \$100 million licensing Java SE.

3 **THE COURT:** On new licenses?

4 **MS. CARIDIS:** On new licenses.

5 **THE COURT:** We need to go to the third point. What is
6 your third point?

7 **MS. CARIDIS:** So the third point, Your Honor, is we're
8 moving to exclude the expert testimony of Mr. Hall. As
9 Your Honor noted, Mr. Hall is an attorney. He was engaged by
10 Google in this case to look at the source code that Google
11 published after the close of fact discovery and provide
12 opinions whether or not that publication conformed with the GPL
13 Version 2 with Classpath exception.

14 So first he says what Google has --

15 **THE COURT:** Say that again. You said it perfectly
16 well, but I was halfway through it and I lost track of it. Say
17 it again. He was retained to do what?

18 **MS. CARIDIS:** He was retained to evaluate Google's
19 post-fact discovery release of publication of source code that
20 included OpenJDK and opine whether or not that was acceptable
21 under the terms of the GPL Version 2 with Classpath exception
22 license.

23 **THE COURT:** So go through the history of that release.

24 **MS. CARIDIS:** Sure. So during fact discovery, Google
25 produced a single document relating to its purported plan to

1 have a future version of Android based on the OpenJDK class
2 libraries. One document.

3 They also produced source code.

4 **THE COURT:** One page or --

5 **MS. CARIDIS:** Both. One page, one document.

6 **THE COURT:** One page, one document. Okay. And when
7 did that get released?

8 **MS. CARIDIS:** November 12th, I believe. Maybe
9 November 8th. I have a copy for you if you'd like it.

10 **THE COURT:** Can I see that?

11 **MR. KWUN:** November 12th, Your Honor.

12 (Pause in proceedings.)

13 **MS. CARIDIS:** Your Honor, the way that it was produced
14 to us, it makes it show up quite small on the page. I
15 apologize for that.

16 (Pause in proceedings.)

17 **THE COURT:** All right. So go ahead.

18 **MS. CARIDIS:** So we have this one single document.
19 They then made the --

20 **THE COURT:** This was on November 12 you got this?

21 **MS. CARIDIS:** We got it on December 4, I believe.

22 **THE COURT:** Okay. But it was dated November 12?

23 **MS. CARIDIS:** Yeah. We got it -- yes. Correct. It
24 was dated in November. It was produced on December 4th.

25 Google then also made available for inspection the

1 in-progress source code that they were working on that's
2 referenced in that e-mail during fact discovery, but they
3 confirmed during fact discovery that there's no actual release
4 of Android using that source code.

5 It wasn't until after the close of fact discovery that
6 they made public that source code. They posted it on their Web
7 page. And then they confirmed with the press that they had --
8 that Google had plans to move a future version of Android to
9 OpenJDK class libraries instead of the 37 at issue here.

10 So that announcement -- that public announcement and that
11 public plan to move to OpenJDK was done December 24th, 2015,
12 after the close of fact discovery.

13 **THE COURT:** Which was what day? I've forgotten.

14 **MS. CARIDIS:** I believe it was a Thursday.

15 **THE COURT:** What was the day of the close of fact
16 discovery?

17 **MS. CARIDIS:** December 16th, Your Honor.

18 **THE COURT:** All right. So what did Mr. Hall do?

19 **MS. CARIDIS:** So then on January 8th we got the
20 opening report of Mr. Hall, and he looked -- he purports to
21 have talked to some engineers at Android and to look at what
22 Android was planning on doing with the OpenJDK libraries, and
23 he opines without a whole lot of analysis about the actual
24 license that Google's implementation of OpenJDK is permissible
25 under the relevant license today in 2016.

1 He then says: (reading)

2 "It is also my opinion that Google could have adopted
3 the same approach when OpenJDK was first open sourced
4 licensed pursuant to GPL with Classpath exception in
5 2007."

6 So in a nutshell what he does is he says, "I looked at it.
7 I've interpreted the contract. I've applied it to this case.
8 What they're doing today is okay; and, therefore, what they
9 were doing in 2000 -- it would have been okay for them to do it
10 in 2007," without any additional analysis about the facts or
11 business circumstances at the time.

12 **THE COURT:** So I'm just curious. Do you have a
13 counterexpert that says something else?

14 **MS. CARIDIS:** We do, Your Honor. Our expert is
15 Ms. Gwyn, G-W-Y-N, Firth Murray. She was presented as purely a
16 rebuttal to Mr. Hall. We had to go out and retain a new expert
17 to rebut Mr. Hall's responses.

18 In the summary of expert opinions that Your Honor asked
19 for earlier this week, we made clear that if Mr. Hall is
20 excluded, Ms. Murray's testimony will not be necessary.

21 **THE COURT:** Does Hall testify to anything other than
22 this JDK problem?

23 **MS. CARIDIS:** His report includes many, many pages
24 about general background of open source licenses and, you know,
25 discussing different open source licenses.

1 As we talked about at length this morning, I think that
2 the entirety of this OpenJDK counterfactual should be excluded,
3 and so I'm not sure what the relevant basis would be for any of
4 that other testimony.

5 **THE COURT:** Well, if fragmentation came in, wouldn't
6 it be relevant to fragmentation even if the OpenJDK -- would it
7 be relevant to fragmentation?

8 **MS. CARIDIS:** Your Honor, I don't believe so. I think
9 the way that fragmentation would be relevant here is that
10 Oracle and Sun offered a potential license that did not require
11 full compatibility with the TCK.

12 It doesn't -- the details of that license, as it relates
13 to the open-source aspects, I don't think are relevant. What
14 is relevant to the only fair use theory that Google disclosed
15 during fact discovery is Sun had this license that permitted
16 fragmentation, but the open-source aspect of it is an entire
17 sideshow.

18 **THE COURT:** All right. Let's hear from Mr. Kwun.

19 **MR. KWUN:** Yes, Your Honor. The relevance of the
20 fragmentation point is that Sun offered to the world a license
21 that allowed people to have a full implementation of Java SE
22 that allowed them to do all sorts of things that they now claim
23 we did that caused them harm.

24 And they claim that they've lost licensing opportunities,
25 that they've lost revenue, and that this curiously coincides

1 with the timing of our release of Android. It also curiously
2 coincides with the timing of the open source release of
3 Java SE.

4 So for them to be able to argue that we caused this harm
5 because there is a sudden change in the trajectory of their
6 licensing revenue when, in fact, they exclude us or attempt to
7 exclude us from offering evidence about what happened in the
8 real world -- not a counterfactual, what they actually did with
9 OpenJDK, what they actually told people that they could do with
10 OpenJDK -- would be unfair and prejudicial.

11 The --

12 **THE COURT:** Well, but, you know, you wait till a few
13 days before the end of fact discovery, and you gin up this
14 version called OpenJDK, which no one has ever used except in
15 your laboratory. How fair is that?

16 **MR. KWUN:** So, Your Honor, we have testimony from an
17 IBM witness that they have used OpenJDK. They have been a
18 contributor to OpenJDK since 2010. We are not the only ones
19 using OpenJDK.

20 **THE COURT:** I'm talking about your version of Android
21 that uses OpenJDK. Is any manufacturer using that now?

22 **MR. KWUN:** It's not on a phone that has been released
23 to the public, that is true.

24 **THE COURT:** Okay. Well, then it sounds like something
25 ginned up for the litigation.

1 **MR. KWUN:** Your Honor, we disclosed this to Oracle on
2 November 12th. As of November 12th, they had access to the
3 source code. They came. They inspected the source code on
4 November 25th.

5 We had a very brief period --

6 **THE COURT:** The source code in progress.

7 **MR. KWUN:** Of the source code that fully implements a
8 version of Android that you could use, that operates.

9 **THE COURT:** The very same one that Hall examined?

10 **MR. KWUN:** Yes.

11 **THE COURT:** Sounds like it was in progress. So you're
12 saying it's identical. He viewed the same one that was
13 produced to the other side?

14 **MR. KWUN:** So, Your Honor, by the nature of the way
15 it's published, it is a -- it's what's called a version control
16 system. And so when we published it in December to the world,
17 it included the dates of all the changes. So you can see any
18 version of the code on any date, and --

19 **THE COURT:** But you want to exclude all these new
20 products that they want to put in -- on the other motion, you
21 want to exclude them; but we hear you have a new product called
22 OpenJDK for Android that you came up with at the end of the
23 class -- at the end of the discovery period. How fair is that?

24 **MR. KWUN:** Your Honor, this is directly relevant to
25 what happened in 2007 when they open sourced OpenJDK.

1 **THE COURT:** No, it's not. Why didn't you do it back
2 in 2007, 2008, 2012 instead of 2015?

3 **MR. KWUN:** Well, Your Honor, they had an opportunity
4 to ask our 30(b)(6) witness who was presented on this point why
5 we made the choice to use OpenJDK today --

6 **THE COURT:** Well, I'm asking that question.

7 **MR. KWUN:** -- and the reason -- they didn't ask her
8 many questions about that; but the key thing that happened --

9 **THE COURT:** Well, it's clear. It's clear. It's a
10 gimmick to use for litigation. Come on. That's what it is.

11 **MR. KWUN:** Well, Your Honor --

12 **THE COURT:** It's just a gimmick.

13 **MR. KWUN:** The key thing that happened recently in the
14 recent history is that in 2010 -- that in 2007, there were a
15 lot of industry supporters of Open -- excuse me -- of Harmony.
16 In 2010, the last of the major supporters, which was IBM,
17 shifted their development efforts for open source Java SE to
18 OpenJDK. Shortly thereafter you had Apple release versions of
19 OpenJDK implementations on the Mac OS. You had SAP announce
20 that they would be using OpenJDK.

21 So in this time period -- in the recent time period, as
22 opposed to the time period when Android was initially being
23 developed, in the recent period you have a fair number of
24 industry supporters using OpenJDK. And at that point there's
25 every reason why you might consider using OpenJDK rather than

1 Apache Harmony, which is no longer supported by anyone other
2 than Google.

3 And the disclosure of OpenJDK in November of 2015, I just
4 want to remind the Court that we actually had a very brief
5 period of supplemental discovery; and so although November 12th
6 I will admit is approximately one month, slightly more than a
7 month before the close of discovery, we are talking about a
8 very short supplemental discovery period. And because that was
9 a very short supplemental discovery period, I don't think a
10 disclosure that happened more than a month before the close of
11 discovery will unduly prejudice Oracle if we're allowed to have
12 testimony about it.

13 The publication to the world in December of 2015 is
14 irrelevant to the question of whether or not Oracle knew about
15 this. We sent an e-mail to Oracle on November 12th, and this
16 is in the briefing. And, Your Honor, may I pass a copy of that
17 up?

18 This is an e-mail where we served a supplemental
19 interrogatory response, and we noted in the e-mail itself, they
20 didn't even have to open the attachment, that: (reading)

21 "We are making available for inspection
22 in-development source code implementing versions of
23 Android using OpenJDK. Please let us know when you would
24 like to inspect the code per the procedures under the
25 protective order."

1 So that's what we told them on November 12th. And in our
2 interrogatory responses, we said, and I quote: (reading)

3 "Google further states it is developing Android
4 versions using OpenJDK, which is a free and open source
5 implementation of the Java platform Standard Edition,
6 Java SE, and it's made available under the GNU General
7 Public License Version 2, GPLv2, with the Classpath
8 exception."

9 We didn't hide the ball on this. When the e-mail went out
10 internally to the Android team announcing that we were making
11 this move, on that day we served them with a supplemental
12 interrogatory response. On that day we told them that the
13 source code was available for inspection. That was more than a
14 month before the close of discovery. Their expert came and --
15 or consulting expert came and reviewed the source code on
16 November 25th.

17 **THE COURT:** What do you learn when you review the
18 source code?

19 **MR. KWUN:** If you review the source code, you can see
20 what it is we do with this. And the reason why that is
21 important is because the Classpath exception applies when you
22 have modules of code written by someone other than the licensor
23 that link with the licensee.

24 **THE COURT:** Has it been run on hundreds of different
25 applications to make sure it actually works as opposed to

1 having a lot of bugs? How do we know how good this is?

2 Just looking at the source code won't tell you unless
3 you're good at spotting bugs. It's not going to tell you where
4 the bugs are unless you run it and exercise it through hundreds
5 of different applications, thousands probably. Has that
6 occurred?

7 **MR. KWUN:** Well, I don't know all the details of the
8 tests that have been run. I do know that there are general
9 tests that apply to releases of code to make sure that, as best
10 as possible, it does not have -- that the changes that were
11 made do not introduce bugs.

12 And I do know that we offered the engineering director,
13 who is responsible for, among other things, the core libraries
14 in Android, we offered him for deposition, including on the
15 topic of commercially reasonable noninfringing alternatives,
16 and that was the phrase that they used -- Oracle used in their
17 30(b)(6) notice. He was offered for deposition. They kept him
18 on the record for four hours. They concluded the deposition
19 midafternoon. He was available to testify about the
20 development process, what we did to develop, what we did to
21 test. Those questions were not asked of him.

22 **THE COURT:** All right. Your reply, and then we've got
23 to move on.

24 **MS. CARIDIS:** Sure. Very briefly.

25 As you heard from Mr. Kwun, there is no phone that has

1 this OpenJDK version being sold in the marketplace. The
2 OpenJDK version was not released or announced until after fact
3 discovery. It is not accused in this case, and Google has
4 conceded that it's not advancing a -- pardon -- is not
5 advancing an express license defense in this case either.

6 I will also note just for the record that we
7 interviewed -- sorry -- we deposed the head of Android,
8 Mr. Lockheimer, in December of 2015, and he testified basically
9 to really not knowing anything about this OpenJDK version until
10 that Project NSO e-mail was released.

11 So I think the entire timing and the testimony that we
12 have from the head of Android further calls into question this
13 release.

14 But even putting aside that fact, it wasn't announced
15 until after fact discovery closed. Their opinions --

16 **THE COURT:** Well, he said that you knew about it
17 through this e-mail.

18 **MS. CARIDIS:** And he said it was in-development source
19 code.

20 **THE COURT:** What does that mean?

21 **MS. CARIDIS:** It means it was a work in progress.

22 **MR. KWUN:** Your Honor, it means it's subject --

23 **THE COURT:** But counsel said that the in-development
24 source code was exactly what Hall looked at; right?

25 **MR. KWUN:** Yes, Your Honor.

1 **THE COURT:** Or is that -- so -- but at the same --
2 okay. But how are they supposed to know that -- it says "in
3 development."

4 **MR. KWUN:** Your Honor, that's why we made the source
5 code available for inspection. That's why we made Mr. Ghuloum
6 available as a witness.

7 **THE COURT:** Well, but put yourself on the receiving
8 end of a memo like this. Well, first of all, what did the
9 Interrogatory 37 say?

10 **MR. KWUN:** Interrogatory 37 --

11 **THE COURT:** Supplemental response.

12 **MR. KWUN:** Yes. So the interrogatory asked us to
13 identify all licenses Google has taken in connection with the
14 development or release of any version of Android.

15 When we started this work, we accepted the OpenJDK
16 license. So we revealed that we were developing Android
17 versions and -- excuse me.

18 So we quoted at the end of this: (reading)

19 "Google further states that it is developing Android
20 versions using OpenJDK, which is a free and open source
21 implementation of the Java platform Standard Edition,
22 Java SE, and is made available under the GNU General
23 Public License Version 2, GPLv2, with the Classpath
24 exception."

25 So in response to a question about what licenses we had

1 taken, we disclosed that we were using their code subject to
2 their license, and then we let them know that in addition to
3 that interrogatory response, we were making that source code
4 available.

5 **THE COURT:** All right. Where did you let them know
6 how you were going to be using this in the trial?

7 **MR. KWUN:** Well, that was we responded to the
8 interrogatories that were responsive --

9 **THE COURT:** You said --

10 **MR. KWUN:** -- that called for this information.

11 **THE COURT:** But now you're -- after the close of
12 discovery you have sprung on them a much more detailed picture
13 of how you're planning to use it.

14 **MR. KWUN:** Your Honor, we were asked --

15 **THE COURT:** This fragmentation, it's going to be used
16 on fair use, factor two, factor four, and then on damages. So
17 what you did was respond to an interrogatory asking about what
18 licenses have you taken.

19 **MR. KWUN:** Yes, Your Honor, we responded to that
20 interrogatory. We responded to -- we supplemented our response
21 to the fair use interrogatory. We offered them the factual
22 bases for our fair use defense.

23 **THE COURT:** That came after the close of discovery.

24 **MR. KWUN:** That came -- you're right, Your Honor, that
25 interrogatory response came after conclusion of discovery.

1 The -- well, that's all I can say for now. There may have
2 actually been a supplemental response in between that included
3 some of that. I'm not sure.

4 But we disclosed our use of OpenJDK. We disclosed the
5 code. We disclosed the license that we were using, and we made
6 a witness available on the topic of noninfringing alternatives,
7 which was their question.

8 **THE COURT:** I'm sorry. You made -- where does it say
9 you will make available a witness on noninfringing
10 alternatives?

11 **MR. KWUN:** That's not there. That's the Ghuloum --
12 Anwar Ghuloum whose deposition testimony is addressed in the
13 *motion in limine* and in the opposition. He was our
14 Rule 30(b)(6) designee on, as I recall, a couple of topics; but
15 one of the topics, topic 10, asked for in part everything that
16 we believed to be a commercially reasonable, noninfringing
17 alternative to our use of the 37 API packages.

18 **THE COURT:** When did that testimony occur?

19 **MR. KWUN:** That testimony occurred in early December.

20 **THE COURT:** Early December?

21 **MR. KWUN:** Yes.

22 **MS. CARIDIS:** December 9th, Your Honor.

23 **THE COURT:** So December 9 was the first time they
24 learned that this was going to be asserted as a noninfringing
25 alternative?

1 **MR. KWUN:** I think that in so many words perhaps; but,
2 Your Honor, they were clearly aware of this possibility. They
3 marked at the deposition the e-mail announcement of
4 December 12th -- excuse me -- of November 12th as a deposition
5 exhibit. They asked questions, not that many, but they asked
6 questions about the OpenJDK alternative. Clearly they were
7 aware that this was going to be an issue.

8 **THE COURT:** Okay. We've got to move to something
9 else.

10 Yes, Ms. Anderson?

11 **MS. ANDERSON:** Christa Anderson. I apologize.

12 Your Honor had asked some questions before about -- you
13 wanted to see the documentation about the agreement that we had
14 with Oracle that we didn't need to recite and restate stuff
15 that had happened in the original trial because the parties
16 wanted to sort of streamline the contention rog and
17 supplemental rog response process.

18 And, interestingly -- I have collected the correspondence
19 on the subject -- this agreement had its genesis in an
20 objection by Oracle who didn't want to do that.

21 And so we have some e-mail correspondence, which I have on
22 my computer. If the Court would like us to submit it, we can;
23 but basically we note in the first correspondence in October of
24 2015 that Oracle was not happy with the idea that they would
25 have to restate what occurred in the prior trial. And we

1 explain:

2 While we previously proposed that Oracle respond to
3 interrogatories by identifying portions of the trial transcript
4 and exhibit list that it was relying on, you have expressed
5 concern -- you, Oracle, have expressed concern that identifying
6 those portions was unduly burdensome. In light of that
7 concern, we propose Oracle respond by stating it reserves its
8 right to rely on the trial record, deposition, and exhibits and
9 briefing in this case, and stating it's unaware of additional
10 bases for its contention beyond what occurred before. So if
11 Oracle has learned of new facts that are not within the trial
12 record, et cetera, then we believe that Oracle has to identify
13 new facts.

14 And this became essentially a no-surprises agreement.
15 That agreement -- this e-mail I was paraphrasing from was from
16 October 22nd. This agreement was confirmed by Oracle's counsel
17 on November 2nd, 2015.

18 And, in fact, Oracle applied this process in responding
19 to, for example, its response to the fair use interrogatory we
20 issued to them. They served a supplemental response on the
21 last day of discovery to Rog 23; and in that response they
22 state, quote -- among other things, they state, quote:
23 (reading)

24 "Facts supporting this conclusion were set out in the
25 previous trial in this matter, and Oracle hereby

1 incorporates and refers Google to the previous trial and
2 appellate record, including all trial exhibits, all
3 testimony, and all Trial Court and Appellate pleadings and
4 briefings on this issue. Facts supporting this contention
5 also include," and then go on to list other things.

6 So this was an agreement the parties abided by,
7 Your Honor, and we abided by it as well, and I wanted to just
8 identify that for the Court.

9 **THE COURT:** All right. I'm going to get you to put
10 that in writing.

11 What do you say to that, Ms. Caridis?

12 **MS. CARIDIS:** Sure, Your Honor. I am not aware of
13 anyplace, nor have we heard of anyplace from Google where in
14 the trial record, the deposition, or anyplace in the past
15 Google disclosed that it thought that OpenJDK was relevant to
16 any fair use issue other than fragmentation.

17 So even if they want to rely on the entire wealth of
18 evidence that happened at the first trial and before, we were
19 still surprised, caught off guard, not put on notice that they
20 were going to rely on OpenJDK for these three previously
21 undisclosed theories. We asked them during fact discovery for
22 their theories. They gave us fragmentation.

23 **THE COURT:** So by 9:00 o'clock tonight, Ms. Anderson,
24 you put in writing what you just covered; and by 9:00 a.m.
25 tomorrow, you give me your response.

1 **MS. CARIDIS:** Yes, Your Honor.

2 **THE COURT:** All right.

3 **MS. ANDERSON:** Thank you.

4 **THE COURT:** Just on this issue of whether or not there
5 was some agreement to the effect that I just heard.

6 All right. Before we -- we've had a small amount of
7 discussion about noninfringing alternatives, and I don't know
8 the answer to what I'm about to say, so I'm not making a ruling
9 on this; but tomorrow when we get to the -- not tomorrow, next
10 week -- I'm going to give you an example of something that I
11 think would indicate that noninfringing alternatives is not the
12 right analysis when you come to disgorgement. I'm only talking
13 now about disgorgement.

14 So I'll give you a hypothetical. Let's say somebody has a
15 guidebook for San Francisco. It has 200 pages, and 100 pages
16 are photographs of landmarks. One of the photographs is a
17 copyrighted photograph by some local photographer, and it got
18 used in violation -- without a license and it should not have
19 been. Let's say it appears on page 79.

20 Let's say that the guidebook is a big success, and so the
21 photographer sues and says, "I should at least get the 200
22 pages -- my picture takes up one page of 200, so I should at
23 least get half a percent of all the gross royalties." And
24 let's say that turns out to be \$10,000.

25 And so then the other side, the defendant, comes forward

1 and says, "Oh, well, we had a noninfringing alternative. We
2 could have just paid \$10, made our own picture, stuck that in
3 there. We didn't need to use your picture. We could have used
4 our own picture, and it would have cost us \$10." So that the
5 noninfringing alternative -- under that analysis, the plaintiff
6 winds up getting \$10 instead of the larger amount.

7 But that ignores the fact that the book as sold had 200
8 pages and had 100 photographs, and the poor guy who was the
9 photograph photographer helped contribute to the success of the
10 book and should get 1/200th in my opinion in that case.

11 So I question whether or not this idea of a noninfringing
12 alternative -- I think this is something maybe the economists
13 invented because they get paid all the time by big firms to
14 come up with these kind of ideas. So I acknowledge that even
15 Dr. Kearl seems to like the idea, but that doesn't mean it's
16 right.

17 So then I asked my law clerk the question -- who, by the
18 way, he doesn't get to sleep at night -- I say, "Give me the
19 case law in the Court of Appeals on noninfringing alternatives
20 and when it can be used." And he says, "I'll get to it. It's
21 a list of 45 things I've got to do."

22 So you're going to do it for me. I want you to give me a
23 brief by Friday at noon, that's two days -- what is today?
24 Thursday? Okay. I'll give you till midnight on Friday to give
25 me a brief on the case law, five pages, where Courts of

1 Appeal -- I'm not talking about district judges, I want Courts
2 of Appeal -- have weighed in on when you can use noninfringing
3 alternatives for apportionment. That's what we're talking
4 about here, apportionment.

5 It can be in the patent context. It can be in any
6 context. Obviously copyright would be much better, more on
7 point; but the general problem we have is where you have an
8 indirect -- you have one small item out of many, many dozens of
9 things that contribute to profits. How do you go about
10 apportioning the profits to the one item that was infringing,
11 the accused item?

12 And sometimes that's going to come up in patent cases.
13 It's going to come up in copyright. It's going to come up in
14 other contexts. And I would like to see if the Courts of
15 Appeal have blessed this approach. Maybe they have. I don't
16 know. But I can't do everything and my law clerk can't do
17 everything, and so I want to know the answer to that question.

18 Okay. Are the lawyers here on the case management
19 conference yet for the 11:00 o'clock calendar?

20 **UNIDENTIFIED SPEAKER:** Yes, Your Honor.

21 **THE COURT:** Okay. We're going to interrupt this.
22 Just we're going to take -- I only need you for five minutes.
23 Come up here, please.

24 And then you other lawyers just stay right here, and as
25 soon as I can, I'm going to come back to you.

1 (Recess taken at 10:58 a.m.)

2 (Proceedings resumed at 11:01 a.m.)

3 **THE COURT:** Okay. Now we go back to Oracle versus
4 Google, Case Number 03561.

5 And we finished up on that motion. Let's go to the motion
6 on new products.

7 **MR. PAIGE:** Good morning, Your Honor. Gene Paige
8 appearing on behalf of Google.

9 **THE COURT:** P-A-G-E.

10 **MR. PAIGE:** P-A-I-G-E, Your Honor.

11 **THE COURT:** Say it again.

12 **MR. PAIGE:** P-A-I-G-E.

13 **THE COURT:** P-A-I-G-E.

14 **MR. PAIGE:** Yes, Your Honor.

15 **THE COURT:** With an E at the end?

16 **MR. PAIGE:** That's correct.

17 **THE COURT:** All right. And Simpson, as I recall;
18 right?

19 **MS. SIMPSON:** That's correct, Your Honor.

20 **THE COURT:** Okay. Go ahead.

21 **MR. PAIGE:** So pursuant to Your Honor's order of
22 February 5th, which said what was going to be in the case, when
23 we saw lots of discussion of various products beyond mobile
24 phones and tablets in Oracle's reports, as you know, we moved
25 to exclude that evidence of the implementations you ruled would

1 not be part of the trial. They weren't considered by the first
2 jury, and so they shouldn't be part of this retrial on fair
3 use.

4 Now, in its opposition, Oracle has agreed that it's not
5 going to raise Brillo at trial -- and that's Note 1 of the
6 first page of its opposition -- and so we believe our motion is
7 unopposed to that extent, and any evidence of Brillo and
8 products using Brillo should be excluded.

9 With respect to the rest of the additional new products
10 that Oracle would like to put into evidence, they say that the
11 Java APIs are on these products, but that doesn't really tell
12 the full story.

13 For something like Android Auto, Android Auto is an app
14 that can be run on a system other than Android on the car. For
15 example, Ford cars use what they call the Sync 3 system; and in
16 those cars, there's a system that uses QNX. What's QNX? QNX
17 is a BlackBerry operating system or a company owned by
18 BlackBerry that makes the operating system. It's on those Ford
19 cars.

20 The Android Auto can plug into that QNX system; and when
21 it does so, the app on the Android phone is going to be able to
22 use the display of the car in order to use the apps or get
23 input from the car, so on and so forth, but that's not really
24 on the car. The app is still on the phone.

25 So it's unclear why Oracle needs to bring in evidence of a

1 vehicle that isn't actually using Android, the 37 APIs. It's
2 like saying, well, you can use Bluetooth speakers with your
3 phone or you can use an earpiece with your phone. Therefore,
4 we need to talk about how we're being superseded in the
5 earpiece speakers or in the wireless microphone.

6 **THE COURT:** Wait. Wait. I've got -- my inclination
7 is to exclude all of this as a concession to the shortness of
8 life under Rule 403 and to avoid an infringement trial within
9 the trial. So that's -- I'm going to let you have a rebuttal.

10 But, Ms. Simpson, honestly, that's where I am, so you've
11 got to have a very good reason that this should come into
12 evidence.

13 **MS. SIMPSON:** All right, Your Honor.

14 Frankly, Your Honor, I think that would be error to
15 exclude these products.

16 **THE COURT:** That's okay. I've been reversed before,
17 so that does not scare me.

18 **MS. SIMPSON:** What we need to focus on here,
19 Your Honor, is that Android is an operating system. It's a
20 software platform. It is not a device.

21 We're getting all caught up in what devices Android is
22 running in, but Android runs in lots of consumer-facing
23 devices, and we have accused not the devices. We have accused
24 Android. We have accused certain versions of Android, and they
25 have conceded that those versions of Android contain our APIs

1 and they're infringing unless they can show that the use was
2 fair. That is what we're talking about here.

3 There is no bases to arbitrarily draw lines between
4 products, Your Honor. It happens to be running in a phone. We
5 all agree.

6 **THE COURT:** Of course there is. Look, under factor
7 four, it's the effect on the market for licenses for various
8 derivative products, as well as for the main Java SE. So one
9 of the derivative uses might be some of these additional
10 products.

11 You can always sue later. You can always sue later, prove
12 up that it infringes, and then say how it's not fair use as to
13 that particular market. And you don't have to bring every
14 single possible use in this trial.

15 **MS. SIMPSON:** Your Honor, that's not --

16 **THE COURT:** I don't see why we can't have multiple
17 trials.

18 **MS. SIMPSON:** Your Honor, we can have multiple trials
19 on infringement. We can't have multiple looks at the harm
20 evidence on factor four. The harm evidence has distinct parts
21 that you're supposed to look at with respect to harm. You have
22 to look at the potential markets, you have to look at the
23 actual markets, the potential markets, and you have to ask
24 yourself a somewhat hypothetical question. You have to ask
25 yourself what happens if the use becomes widespread, if you

1 select this, it becomes widespread, which takes the question
2 even outside the parties to the case. It actually looks even
3 beyond that.

4 All of these pieces have to be considered, and to
5 curtail --

6 **THE COURT:** But you're using "widespread" in a
7 different way. You know, the way -- the usage of widespread
8 comes up where you have one guy in his basement who's file
9 sharing songs on Napster and, okay, there's not much harm from
10 one guy doing it; but if thousands of guys in their basements
11 are file sharing songs, then that does have a huge impact.

12 So that's a different problem, and that's the way that
13 phrase came up. That's a different problem from whether or not
14 there is a -- the use of Android in these other markets and
15 with different products is -- we have to draw a line somewhere.
16 We have so much for the poor jury to understand and grasp now,
17 that I despair at how much you lawyers think that they can --
18 in four weeks we're going to be able to teach them.

19 **MS. SIMPSON:** Your Honor, first of all, the widespread
20 inquiry is not limited in the way you suggest. The cases that
21 apply it apply it much more broadly than that. It's not just
22 one guy.

23 **THE COURT:** Give me your best case that's an appellate
24 decision in the Ninth Circuit.

25 **MS. SIMPSON:** Which circuit? The Ninth Circuit?

1 **THE COURT:** The Ninth Circuit would be good; but if
2 you don't have a Ninth Circuit, give me one that's anywhere in
3 the country.

4 **MS. SIMPSON:** Your Honor, in the *Wall Data* case --

5 **THE COURT:** Yeah.

6 **MS. SIMPSON:** -- 447 F.3d 769.

7 **THE COURT:** Is that the Ninth Circuit case involving
8 the sheriff?

9 **MS. SIMPSON:** Yes, it is, Your Honor.

10 **THE COURT:** Okay.

11 **MS. SIMPSON:** So they overused their licensing
12 subscriptions, and the court looked beyond that and said,
13 "Okay. What happens if everybody is overusing their licensing
14 subscription? That could be a widespread use that could have a
15 harmful effect on copyright law in general."

16 **THE COURT:** It's of the same product. Of the same
17 product, the same program. Right?

18 **MS. SIMPSON:** It is the same program, Your Honor. We
19 can look at other cases that deal with widespread use. We
20 could look at, let's see --

21 **THE COURT:** While you're at it, you said it would be
22 error, so you can cite to me the decision that says analogous
23 to this, where you've got a bunch of products already and some
24 new ones come out and haven't even been sued on, that it's
25 error for the judge to exclude those from consideration under

1 factor four. I don't think you have such a case, Ms. Simpson.

2 **MS. SIMPSON:** Your Honor --

3 **THE COURT:** That's just you talking; but if you do
4 have such a case that says it's error for the judge to exclude
5 new products that come out late in the process, I will
6 certainly look at that, and I probably would change my mind if
7 there is such a decision.

8 **MS. SIMPSON:** Your Honor, the question is whether the
9 use is a reasonable market, a likely market, a probable market.
10 These are not new products. I just want to be clear. They're
11 new products for Android. They are not new products for Java.
12 These are products that Java has been running in in many cases
13 since the early '90s. So this is not a hypothetical market.
14 This is not a market that we haven't been in.

15 **THE COURT:** That they haven't been sued on.

16 **MS. SIMPSON:** This is an established market that they
17 are --

18 **THE COURT:** That haven't been sued on yet.

19 **MS. SIMPSON:** Your Honor, we sued on Android.

20 **THE COURT:** What?

21 **MS. SIMPSON:** We sued on Android. We sued the
22 software platform. The software platform is running --

23 **THE COURT:** You'd have to --

24 **MS. SIMPSON:** -- in devices that are affecting us in
25 these other markets.

1 **THE COURT:** You'd have to prove that. You'd have to
2 prove that.

3 **MS. SIMPSON:** Your Honor, the reply that they put in
4 suggesting that this stuff is not running is actually
5 sufficient to show that this should stay in the case, so let's
6 look at what their reply said.

7 In their reply they say: (reading)

8 "Android Auto app is an application that runs on an
9 Android phone. When a consumer runs the Android Auto app
10 on an app on an Android phone, the screen in his or her
11 Android Auto compatible car is used as a display."

12 Your Honor, that essentially admits that what we're
13 talking about here is the phone; right? Your Honor, the phone
14 is not even disputed. A phone we all agree is in the case.
15 They have now admitted that Android Auto is running through a
16 phone, which puts it squarely within what everyone agrees is at
17 issue in this case.

18 And we were in autos, Your Honor. We have evidence of
19 harm. We have evidence of being in the automobile industry.
20 We have documents from our salespeople that say they are seeing
21 Android Auto and that they are taking deals away from Java.
22 And that is evidence of harm that we should be allowed to put
23 in, and curtailing that evidence presents an incomplete view of
24 our harm evidence to the jury. And there is no case that's
25 going to say that you can do that, that you can curtail

1 evidence of harm when there's actual evidence.

2 **THE COURT:** Wait a minute. Give me the case that you
3 said it was error. Give me the decision by the Appellate Court
4 that says it's error for a district judge to do what I'm about
5 to do.

6 **MS. SIMPSON:** Your Honor, the case law says that you
7 have to look at the markets that are at issue. So I don't know
8 that there's a case that's going to say exactly what you're
9 asking for. The case law says what the markets are that you
10 have to look at, and those are directed from the Supreme Court.
11 So *Campbell* and *Harper & Row* say that -- what markets you have
12 to look at, and those markets included potential markets.

13 **THE COURT:** Look, in every single case that I've
14 looked at, it's been very clear what the market was. It was a
15 market for movies maybe. It was a market for rap music. It
16 was a market for -- I've forgotten all the other ones, but the
17 market is very well -- it's really just one market.

18 And what you want to do is -- I guess you feel very weak
19 about the markets that you've got in the case. You've already
20 got a lot of markets in the case, and so now you want to lard
21 in a lot more markets and I guess kind of hoping that the jury
22 is going to think -- I don't know what you're thinking, but
23 you've got so many things that you want the jury already to
24 master.

25 Rule 403 really is a powerful thing here. We have to make

1 some trade-offs as to what the ordinary mortals on the jury can
2 understand and comprehend as opposed to making it so
3 complicated with so many big dollars being thrown around that
4 maybe they compromise and give you billions of dollars. Now, I
5 don't like that idea. I want them to understand the case.

6 **MS. SIMPSON:** Your Honor, we talked yesterday about
7 the Supreme Court cases that have ruled on fair use.

8 **THE COURT:** Yeah.

9 **MS. SIMPSON:** And the point was made that three of the
10 four of those are dealing with derivative markets, and that's
11 what we're talking about here. This is not an unusual thing to
12 deal in a derivative market. So even the *Harper* case, that was
13 not the actual market for a book; right? So the book is what
14 was infringed, and the market they were looking at was in a
15 completely different space. It was serialization rights, and
16 that was a derivative market.

17 **THE COURT:** Yes, and it was that one market, one
18 derivative market.

19 **MS. SIMPSON:** And, Your Honor, that is because --

20 **THE COURT:** None other. None other.

21 **MS. SIMPSON:** -- that is because typically in these
22 cases you don't have the expansive record that we have here.

23 And I don't think that there is any reason that Oracle
24 should be punished because we've had more time go by and we've
25 had more opportunity to be harmed. Your Honor, there is just

1 no basis for cutting off the evidence of our harm at any given
2 point.

3 **THE COURT:** There is. There is. There's a limit to
4 what the ordinary jury can grasp and understand.

5 **MS. SIMPSON:** Well, Your Honor, it's -- where is the
6 line --

7 **THE COURT:** That's where Rule 403 comes in. Honestly,
8 if this was the only case and they were all geniuses and could
9 keep everything straight and the judge didn't have other trials
10 that had to be done, then, yeah, maybe we could take 15 weeks
11 and get into all of these other things, but I thought we had
12 agreed on a time limit up front.

13 **MS. SIMPSON:** Your Honor, we did agree on a time
14 limit, and we're --

15 **THE COURT:** You can't do what you're asking to do.

16 **MS. SIMPSON:** We are perfectly prepared to put in our
17 harm evidence within the times that you've given us. We will
18 follow your rules, absolutely, and we've been planning to do
19 that because we expected to be able to present our full
20 evidence on harm.

21 Your Honor, I don't know even where the line is being
22 drawn, to be honest, Your Honor.

23 **THE COURT:** Why didn't you bring this up way back when
24 whenever this first came up and I said these are going to be
25 out of the case? You could have said then, "Oh, but we want to

1 do it for purposes of harm. We'll sue on it later, but we want
2 to bring these in on -- the ones we are suing on as additional
3 harms."

4 **MS. SIMPSON:** Your Honor, we were, I believe, in the
5 courtroom shortly thereafter discussing this very issue.

6 **THE COURT:** I don't remember. I don't remember it
7 being that close.

8 **MS. SIMPSON:** So, Your Honor, the fact of the matter
9 is that we have, you know, exhibits that I can show --

10 **THE COURT:** Of all these products, which is the one
11 that you feel you've got the most desire to put before the
12 jury?

13 **MS. SIMPSON:** And we're talking about between auto,
14 television, and wearables?

15 **THE COURT:** I guess. Auto, television, and wearables,
16 is that the way you understand it, those categories?

17 **MR. PAIGE:** Those are some of the categories they've
18 put into their reports, yes, Your Honor.

19 **THE COURT:** Well, you said that there was one that you
20 conceded on.

21 **MR. PAIGE:** They conceded on Brillo. They conceded
22 they were not going to try to show the use of the 37 APIs in
23 Brillo.

24 **THE COURT:** I don't know what that means.

25 **MR. PAIGE:** It's a thing they accused, and then in

1 Note 1 of their reply -- of their opposition they say:

2 (reading)

3 "We understand Brillo's complicated and so we're not
4 going to try and put in evidence on Brillo."

5 It's page 1, Note 1, of their opposition.

6 **THE COURT:** Okay. Which is the one you feel is the
7 most important to you?

8 **MS. SIMPSON:** Your Honor, I believe that auto would
9 probably be the most important.

10 You know, I think there is a point to be --

11 **THE COURT:** How many products does that involve?

12 **MS. SIMPSON:** How many products is that in?

13 **THE COURT:** I don't even know what we're talking about
14 here. Auto -- it seems like there's got to be a product, an
15 app.

16 **MS. SIMPSON:** It's in automobiles, Your Honor. It's
17 in a variety of manufacturers. They are in a variety of
18 manufacturers.

19 **THE COURT:** It's in a wheel?

20 **MS. SIMPSON:** Sorry?

21 **THE COURT:** It's in a wheel?

22 **MS. SIMPSON:** Oh, no. I'm sorry. It's in the
23 infotainment center, generally speaking.

24 **THE COURT:** All right. So what's wrong with letting
25 them do auto?

1 **MR. PAIGE:** Because, Your Honor, not all cars that run
2 Android Auto have Android in them; right? You have the
3 BlackBerry QNX system.

4 **THE COURT:** She told me that you had conceded that it
5 was in there. She said your reply brief concedes that Android
6 is in there.

7 **MR. PAIGE:** Android Auto is in the phone. It's an app
8 that can then be run using a system like the QNX system by
9 BlackBerry on a car. So the fact that a car can run
10 Android Auto apps does not mean there is Android in the car
11 itself. It does not require that. The Ford Sync 3 system
12 again uses QNX, an operating system owned by BlackBerry.

13 I mean, what they would like to do is just say, "We were
14 in cars, now you're in cars. That means you superseded us.
15 You replaced us. It can't be fair use." And that's not a fair
16 presentation of the evidence.

17 **THE COURT:** How does the thing work in the car? What
18 do you mean it uses the phone?

19 **MR. PAIGE:** What we mean is there's an app on the
20 phone that you can then take the phone and plug it into the
21 system through a USB cord, and then that will allow you to
22 display what, you know, the phone has on the car head-up
23 display there.

24 **THE COURT:** Yeah.

25 **MR. PAIGE:** And you can also use the car systems, like

1 the buttons on the steering wheel, to give instructions back
2 through the system to your phone. That doesn't require the
3 thing sitting on the car. The infotainment system runs
4 Android. The QNX system, again, is capable of running
5 Android Auto apps or running the Android Auto app through the
6 phone through the USB.

7 **THE COURT:** But you're already conceding that the
8 phone uses Android.

9 **MR. PAIGE:** Yes. Absolutely.

10 **THE COURT:** So what is the additional derivative use
11 beyond the phone itself that there could be a possible license
12 of Java for?

13 **MS. SIMPSON:** Your Honor, Java runs in the cars in a
14 different way; right? It embeds Java into the automobile. And
15 Android does that too, and we have testimony from their
16 witnesses. It's not only running on the phone, it also is
17 embedded in the cars.

18 And that is a competing market space. We have evidence
19 from our salespeople saying that they're seeing Android taking
20 deals away from them that we intend to present. It's not
21 lawyer argument. It's not us getting up here and saying, "We
22 were in cars, now they're in cars, and they're superseding us."
23 We have witnesses that are going to come in and say, "I'm in
24 this space. I sell to car manufacturers, and Android is now
25 taking my customers."

1 **THE COURT:** What do you say to that?

2 **MR. PAIGE:** It's true, Your Honor, that you can put
3 Android on cars. My point is that you don't have to have the
4 Android on the car to use the Android Auto system. You can use
5 the Android system. You can use the QNX system. You can use
6 other systems.

7 And what they're saying is, "Well, we had Java in cars."
8 But what does that mean? There's no evidence about what Java
9 did in their cars, that it's the same sort of thing that the
10 Android Auto is doing today, that it's anything other than,
11 say, being able to display a radio station on the head-up
12 display.

13 I mean, just to say, "We were in cars, now you're in cars;
14 and, therefore, you're superseding us," that's a very unfair
15 argument.

16 **THE COURT:** But you're saying licenses. I'm trying to
17 understand what the line of commerce is. Who signed the
18 license with Oracle? Was it the car manufacturer? You got a
19 license to use Java in the car, is that the way it works?

20 **MS. SIMPSON:** Yes, Your Honor.

21 **THE COURT:** All right. So now I guess there would be
22 fewer of those because Android is being put in there in some
23 cases.

24 **MS. SIMPSON:** Your Honor --

25 **THE COURT:** How many cases is it being put in there?

1 **MS. SIMPSON:** We have testimony from Mr. Lockheimer of
2 Google that in the past two to three years they have licensed
3 50 car manufacturers for Android in a market that we were in
4 before Android came to the scene.

5 **THE COURT:** Okay. Anything more you want to add on
6 this?

7 **MS. SIMPSON:** Your Honor, I would just add this is
8 highly probative evidence, and I understand your 403 concerns.
9 We're willing to work within your time limits. We're willing
10 to put the evidence in a streamlined way, but the fact of the
11 matter is you do have to weigh whether something is probative
12 or whether it's going to be prejudicial or take up too much
13 time. There is nothing more probative than this evidence.
14 This evidence is highly relevant to the case. It is our harm
15 evidence.

16 **THE COURT:** It sounds like you don't have much of --
17 if this is your best case, what happened to the rest of your
18 case?

19 **MS. SIMPSON:** Your Honor, we, of course, have a lot of
20 other things to talk about in terms of harm; right? Obviously
21 we're going to talk about mobile phones, but there are other
22 products. For example, the Android e-reader, I'm not sure
23 which side of the line that's falling on here. That came into
24 the trial last time.

25 We have very good evidence that we were in the Amazon

1 Kindle, and that when Java came -- or when Android came along,
2 they replaced us in the Fire, and now we're still in the Kindle
3 in SE but we're not getting any of the Fire business. That was
4 part of the trial last time. I don't know which side of the
5 line that falls on. I would submit since it's an e-reader
6 and a mobile handheld device in a sense, that it should fall on
7 the line of coming in.

8 Same thing with voiceover Internet protocol phones. We
9 were in those. Recently we've been replaced by Android. Those
10 are phones as well. I'm thinking those come in.

11 But, Your Honor, I'm not sure, is it just the TVs and the
12 cars and the televisions that we have issues with? I mean,
13 we've been in televisions since '98, billions of televisions.
14 We're the standard in Brazil for televisions.

15 **THE COURT:** Let's go to Mr. Paige. Is it true that
16 Google has 50 licenses with automobile manufacturers?

17 **MR. PAIGE:** I don't know the answer to the number of
18 licenses that we have, Your Honor.

19 **THE COURT:** Well, Ms. Simpson, you said it was 50;
20 right?

21 **MS. SIMPSON:** The deposition of Lockheimer on page 100
22 says it was 50.

23 **THE COURT:** All right. So why wouldn't those have
24 been 50 licenses that Java would have gotten?

25 **MR. PAIGE:** Well, because the car manufacturers also

1 use BlackBerry's QNX system; right? It's not just a choice
2 between using Java and using Android. There are other
3 infotainment system providers out there.

4 **THE COURT:** Yeah, but Android uses Java. So if they
5 are getting a license to use Android, why would those other
6 systems even be in the cars? I'm trying to understand why it
7 necessarily follows or doesn't follow that -- it's either
8 Android or Java.

9 **MR. PAIGE:** Again, it doesn't necessarily follow it's
10 either Android or Java because there are systems like
11 BlackBerry QNX that runs on the Ford Sync 3 system that can be
12 used by car manufacturers. It isn't a binary choice between
13 Android and Java by any means.

14 **THE COURT:** What do you say to that, Ms. Simpson?

15 **MS. SIMPSON:** Your Honor, again, I would point to our
16 very specific evidence. This is not going to be generalized
17 presentations of we were there and now they're there. This is
18 going to be very specific examples of particular customers that
19 we have documentary evidence for and/or witnesses that will
20 come in and say, "I sell to this customer. This customer chose
21 Android instead of Java."

22 **MR. PAIGE:** And here's the problem with that,
23 Your Honor: All this stuff is coming from Mr. Jaffe's
24 corrected report where he basically relies on a few documents
25 and some newspaper articles and magazine articles, and things

1 like that. There's no discussion of how Java worked or works
2 in cars versus how Android worked or works in cars.

3 They're going to say, "You're superseding us because we
4 were there and now you're there," without any question as to
5 whether this use is transformative, as to whether we're doing
6 something very different than what Java does, as to whether
7 we're adding things that Java never had. So it isn't just
8 superseding.

9 **THE COURT:** You're going to say all that stuff about
10 transformative.

11 **MR. PAIGE:** Well, we're going to need to say it if
12 they're going to just come in and have a guy sit on the stand
13 and say, "Well, we were there and now Android is there." We
14 need to explain why it is that we're transformative. This
15 isn't just superseding is what they're going to say. You can't
16 possibly say, "This is fair use because we were there and now
17 you're there despite the fact that we don't really talk about
18 what we did and what Android does." That's not in Mr. Jaffe's
19 report. It's just --

20 **THE COURT:** They don't have to prove everything
21 through one witness.

22 **MS. SIMPSON:** We're not intending to, Your Honor.

23 **THE COURT:** They can -- they want to put on some
24 evidence, maybe even percipient evidence, as to factor four.
25 In fact, you don't even have to have an expert on the four

1 factors. You know, I was a lawyer. You would maybe prove it
2 all up with real witnesses, fact witnesses --

3 **MS. SIMPSON:** Your Honor, we intend to have real fact
4 witnesses.

5 **THE COURT:** -- instead of having some hired gun come
6 in and make the case for you.

7 **MR. PAIGE:** And, Your Honor, that's exactly the point
8 about evidence you're making on 403. Once that happens, we're
9 going to have lots of fact witnesses coming in here to talk
10 about, "You know, here is what Java did before, here is what
11 Android does now," and so on, because what they're going to
12 want to do is just say, "It was there and there."

13 **THE COURT:** Ms. Simpson said you can see that Java --
14 I'm sorry -- that the Android with the infringing APIs subject
15 only to fair use is inside those products. So is that really
16 going to be in dispute?

17 That's what she's telling me, it's not going to be in
18 dispute, that infringement doesn't have to be proven. It's
19 just part of the fair use calculus. That's what she's saying.

20 Look, I don't know the answer. But I will note
21 Ms. Simpson could not cite a single decision that said it would
22 be error to do what I'm proposing to do.

23 **MS. SIMPSON:** Your Honor, I think *Campbell* would stand
24 for that proposition.

25 **THE COURT:** So read it to me.

1 **MS. SIMPSON:** *Campbell* requires the courts to consider
2 not only the extent of the market harm caused by the particular
3 actions of the alleged infringer, but also whether unrestricted
4 and widespread conduct of the sort engaged in by the defendant
5 would result in a substantially adverse impact on potential
6 market for the original. It requires the Court. The Court is
7 required to consider the harm to our markets. It doesn't say
8 some of our markets.

9 **THE COURT:** That's what *Campbell* said or --

10 **MS. SIMPSON:** Yes, Your Honor.

11 **THE COURT:** That sounds like whatever you're quoting
12 from is -- is that your brief you're quoting from? What are
13 you reading from?

14 **MS. SIMPSON:** No. I'm reading from a page of
15 *Campbell*, Your Honor. Quote, "it requires."

16 **THE COURT:** They're referring to themselves and
17 they're saying "*Campbell* requires."

18 **MS. SIMPSON:** No, I didn't -- I don't think I said
19 that. I'll try again.

20 **THE COURT:** Maybe I misunderstood.

21 **MS. SIMPSON:** I'll try again.

22 **THE COURT:** All right. So read it again.

23 **MS. SIMPSON:** So it's page 590 and quoting: (reading)

24 "It requires courts to consider not only the extent
25 of the market harm caused by the particular actions of the

1 alleged infringer, but also whether unrestricted and
2 widespread conduct of the sort engaged in by the defendant
3 would result in a substantially adverse impact on
4 potential market for the original."

5 And then it goes on to talk about derivative works, which
6 we spoke about at length yesterday.

7 **THE COURT:** All right. That's not exactly our
8 situation.

9 But, okay, I'm going to bring it to a close for today.

10 Do we have a hearing tomorrow -- I've lost track of it --
11 or is it next week?

12 **MR. PAIGE:** No, Your Honor.

13 **MS. SIMPSON:** Not that we're aware of, Your Honor.

14 **THE COURT:** Okay. So I want to go into the expert
15 reports on damages from both sides and, time permitting, even
16 for Dr. Kearl. Is anyone here for Dr. Kearl? So somebody --
17 who raised their hand?

18 **MS. HURST:** Nobody is here for Dr. Kearl, Your Honor.

19 **THE COURT:** Somebody let him know.

20 **MS. HURST:** We can let him know.

21 **THE COURT:** I'm not sure we'll get to him, but we'll
22 try. We'll start at 8:00 o'clock on -- what did I say,
23 Tuesday?

24 **MR. VAN NEST:** You did.

25 **THE COURT:** All right. And then for Wednesday we'll

1 schedule two more, but I don't know which two.

2 You-all should know I may not have a ruling until the day
3 or so before trial, and whole swaths of testimony may go out.
4 You're just going to have to -- we're going to have -- that's
5 what you wanted, was a trial, and maybe you don't -- it could
6 be, just to take an example, all of the disgorgement goes out
7 so you don't have a witness on that. It could happen. It
8 could happen to you.

9 So if somebody wants to move now before I gin up and get
10 the jury all in here, because once we do all that, it's going
11 to be -- see, you may not know the -- I may -- we may start the
12 trial and I may not have an answer for you because I'm going to
13 take my time and try to do it as carefully as I can.

14 But once we start the trial, don't come to me and say,
15 "Oh, Judge, you've knocked out my expert. We've got to start
16 all over." No. Oracle is dying to have this trial. I guess
17 you're dying to have the trial, too. And you're giving me
18 things that are just driving me under the water for the third
19 time. So many motions where you disagree.

20 So you have to be -- if somebody wants to move for a
21 continuance, you should do it soon because you're unlikely to
22 know the answers to these questions until -- I find that they
23 feed into each other -- some of them anyway feed into each
24 other so much that I think it would be better to wait and see
25 how I feel about everything before I rule on anything.

1 So there we are.

2 **MR. VAN NEST:** Are you inviting that motion,
3 Your Honor?

4 **THE COURT:** No, I'm not inviting it. I've set the
5 time aside to try the case. So I'm not inviting it, but it has
6 occurred to me that I don't want overhanging my head somebody
7 saying, "Oh, Judge, you've knocked out my witness and now we
8 need a chance to regroup and do it all over again."

9 If I -- at some point we've already got the jury coming
10 in. We're already preclearing them for time.

11 I have to just say, you know, you're all big men and
12 women, and you're just going to have to roll with the punch;
13 and if I knock out your expert, too bad for you. You shouldn't
14 have been overreaching.

15 So I'm not inviting anything. I'm just putting you on
16 notice that it could happen, and there we are.

17 **MR. VAN NEST:** That's fair, Your Honor.

18 One other question I had was: Are we still trailing
19 anybody on the 9th, or are we clear to go?

20 **THE COURT:** To be honest with you, probably we are not
21 trailing because I moved up that criminal trial by one week.
22 They say it would be a week trial. So that means the week
23 before your trial, I would be very busy with a different trial.
24 However, the word in the hallway is that they're going to plead
25 out. Now, will they? You know, I don't know. I can't gamble

1 too much on that, but that is -- now you know everything that I
2 know.

3 **MR. VAN NEST:** Thank you. That's helpful.

4 **THE COURT:** I would say the odds are 70 percent -- you
5 know, at least 70 percent that our trial will go on schedule on
6 May 9th.

7 **MR. VAN NEST:** Thank you.

8 **THE COURT:** Have you ever gone to see Judge Grewal and
9 tried to settle this case?

10 **MR. VAN NEST:** Tomorrow.

11 **MS. SIMPSON:** Tomorrow, Your Honor.

12 **MS. HURST:** Tomorrow, Your Honor.

13 **THE COURT:** Oh, you are. Okay. All right. Well, I
14 didn't know that. I'm glad to hear that there's some
15 discussions going on.

16 I won't make any comments other than what I've already
17 said about settlement is -- I still believe that this is
18 America -- I'm going to give you my standard speech. I'll give
19 you what I say here. Sit down.

20 My standard speech is: This is still America. If either
21 side wants to try their case, God bless them. They get to try
22 their case. And, you know, it's the vicissitudes of a trial.
23 Sometimes you get rulings in the middle of a trial you don't
24 like but, you know, that's the way it goes.

25 And then the second part of it is: At the end of the

1 trial, one of you, I don't know who, will go walking through
2 those double doors with your arm around the client explaining
3 why you lost. I see it with every trial. And the side that
4 loses is -- not always but I would say generally they're kind
5 of shocked that they lost because they had convinced themselves
6 they had a great case.

7 Well, one of you is going to be in that position at the
8 end. And there's always appeals but, nevertheless, you'll have
9 to go through those double doors with your arm around the
10 client, who will be in shock that they are -- you know, they
11 did not win, and you will be having to try to comfort them and
12 comfort yourself.

13 It's a hard moment for a trial lawyer to be in that
14 position, and you clients -- who are the clients here? Raise
15 your hands.

16 So there's clients on both sides. Yeah, you're the ones
17 who are going to be -- one of you may be in that position
18 trying to explain to your company how come you lost.

19 So this is big stakes. And even under the most -- even if
20 I were to knock out disgorgement and still the biggest case
21 that I've ever seen I think, so you -- it's a huge case with
22 big stakes, the possibility of an injunction. I think there's
23 a lot that you-all ought to take into account when you go see
24 Judge Grewal.

25 However, my job is not to try to settle your case. My job

1 is to make fair rulings and give you a fair -- not a perfect
2 trial but a fair trial, and that's what I'm trying to do.

3 Good luck tomorrow. I'll see you on Tuesday. Thank you.

4 **MR. VAN NEST:** Thank you, Your Honor.

5 (Proceedings adjourned at 11:37 a.m.)

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9 **CERTIFICATE OF REPORTER**

10 I certify that the foregoing is a correct transcript
11 from the record of proceedings in the above-entitled matter.

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13 DATE: Sunday, April 14, 2016

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18 _____
19 Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR
20 U.S. Court Reporter
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